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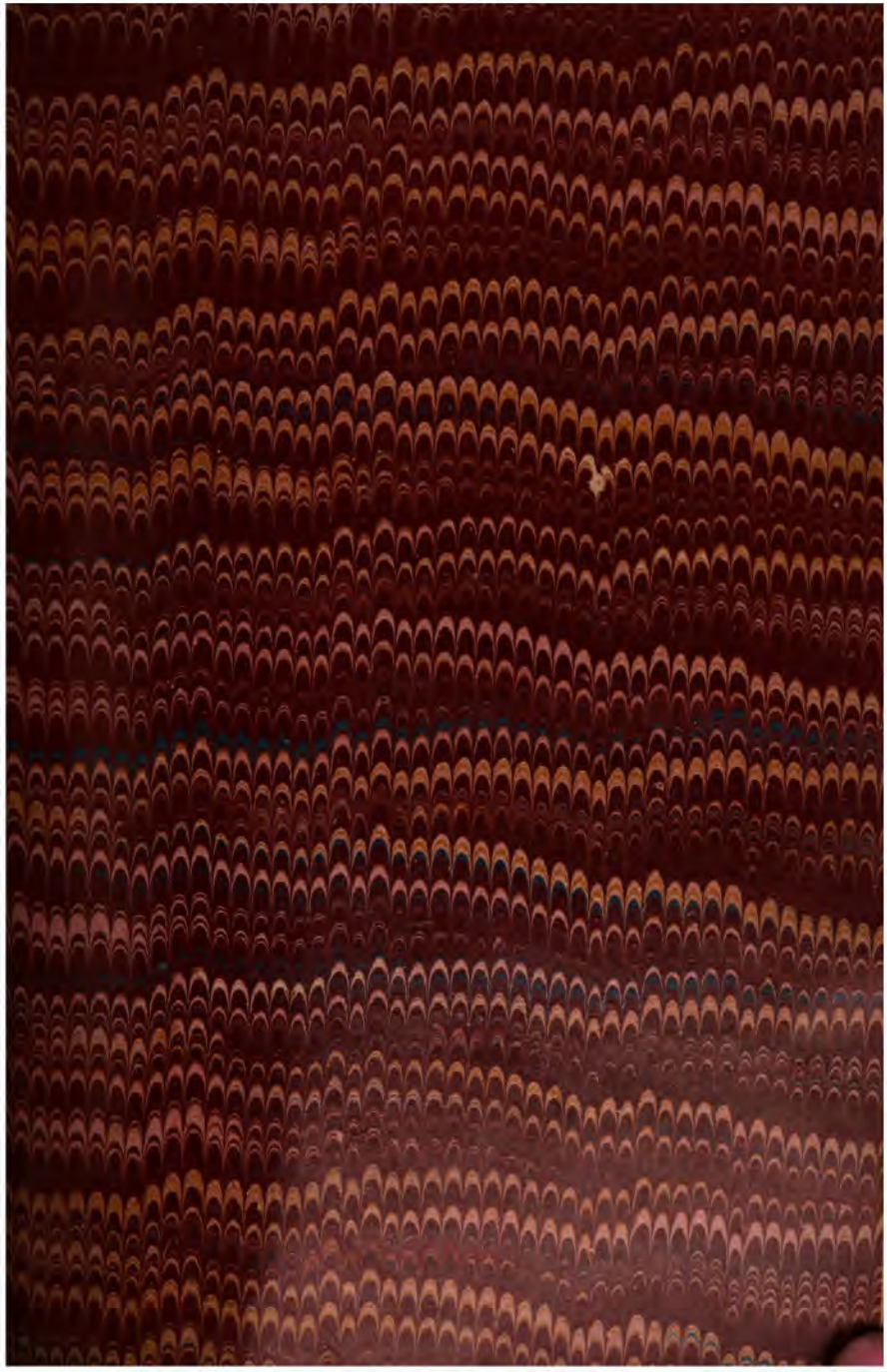

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A TREATISE

ON

THE FISHERY LAWS

OF THE

UNITED KINGDOM,

INCLUDING

The Laws of Angling.

BY

JAMES PATERSON, Esq. M.A.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

London and Cambridge:

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TO

SIR ROUNDELL PALMER, M.P.

Her Majesty's Attorney-General,

THIS WORK

IS WITH GREAT RESPECT INSCRIBED

BY THE AUTHOR.

PREFACE.

THE imminent decay of the Salmon Fisheries of the United Kingdom lately attracted general attention, and induced the Legislature to pass separate statutes for England, Scotland and Ireland, so as to put the law on a better and permanent footing.

The rivers and streams abound in fish, which are not only equally attractive for purposes of sport and of food, but which have this superiority over game, that from their being in constant communication with the sea, they partake of its illimitable qualities in their powers of reproduction. The riparian owners, however, have exclusive access to most of the waters. Holding the key of the situation, they monopolise the means of capture. As between themselves, they have been distinguished for unneighbourly cupidity. The common law undoubtedly was too easy in its tenets, for it allowed each to catch all the fish he could, by

whatever means he pleased, provided these were not such as to destroy and annihilate the neighbours' share of the common subject-matter, and even this check there was no efficient machinery for enforcing. Each accordingly sought to do what he liked with his own part of the river, and often selfishly resorted to wears, dams, and fixed engines, with the view of driving every living inhabitant of the waters into his own net, regardless of the impoverishment of his neighbour. This practice, though in strictness of law illegal, had become too firmly settled to be easily put down by the Courts, or the older statutes. The decay of the fisheries having then become conspicuous, it was necessary for the Legislature to intervene on grounds of public policy, and, with an eye to the benefit of all parties, to restrain the suicidal policy of the riparian owners, making it no longer possible for each to do what seemed good in his own eyes. The Salmon statutes have only one common object, which is more or less imperfectly attained, viz. to secure fair play to the instincts of the fish. All that the fish need is a free run, and if they have this, their numbers will amply suffice for every purpose of pleasure or of business.

The author has viewed the subject, so far as the United Kingdom is concerned, as a whole, and has endeavoured to reduce to some order what has hitherto been proverbial among lawyers for its confusion. The common law of England and Ireland is the same, and their statutory law of poaching fish is also now the same. The other statutes still abound in differences of detail, and Scotland also, in many respects, stands apart; yet in the leading enactments they all agree, and the defects of the one law may often be corrected by a view of the merits of the others.

As Angling is "a license of pleasure rather than of profit," the author has been at some pains to single out and treat separately the chief points of law which bear on that favourite pursuit of contemplative ease.

J. P.

GOLDSMITH BUILDINGS, TEMPLE.
November, 1863.

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A TREATISE

ON THE

FISHERY LAWS OF THE UNITED KINGDOM.

ENGLAND.

CHAP. I.

RIGHTS OF FISHERY VIEWED GENERALLY.

DEFINITION—SEA AND PRIVATE STREAMS—GENERAL RULES—PRIVATE STREAMS—PUBLIC RIVERS—DIFFERENT KINDS OF FISHERY.

Definition.—A fishery is properly defined as the right of catching fish in the sea, or in a particular stream or water; and it is also frequently used to denote the locality where such right is exercised.

Sea and Private Streams—General Rules.—The sea is *primâ facie* open to all the public for the purpose of fishing, and a stream not navigable is *primâ facie* exclusively confined to the use of the owners of the soil subjacent. The water, and all that is in it, is in the former case common to the public to use freely; while in the latter case it is exclusively the property of one or two individuals, or at least so far their property that no other person can take the fish that are found there. Between these extreme limits many qualifi-

cations are introduced. In certain parts of the sea itself, and navigable rivers, an individual may prove his right to exclude all other persons from fishing there; while in a private stream the original owner may have granted away the right of fishing therein to another person or other persons, either jointly with himself or exclusively of himself.

Private Streams—General Rules.—The owner of a field in which is a pond is presumed to be also the owner of the pond and all that is in it. He may keep and catch what fish he pleases there, and is exclusively entitled to them. In a private stream or river, the owner of the adjacent land on both sides is also presumed to be the owner of the stream, so far as regards the right of catching all the fish therein. He is not indeed the absolute owner of the water of the stream itself, for he is not entitled to use up the current, or to foul it, or unnecessarily to retard it or alter its plight and volume, for that would be to injure the rights of the riparian owners further down. Nevertheless, as far as the right of fishing, which is one of the uses of running water, is concerned, he is entire master within his own limits, and can catch as many of the fish as he can find, by whatever means he thinks proper, unless some statute prohibits him, and under the qualifications to be afterwards mentioned. The reason of this right of fishing in a private stream being an exclusive and absolute right is, that as he is the owner of the land on both sides, and also of the land subjacent, no one else can come there without being a trespasser, and thus there is nobody who can prevent him doing what he

likes with his own. There is, however, this qualification to the right, even at common law: that inasmuch as most streams run into the sea, and many fish come from the sea upwards into the stream, those proprietors nearest the sea cannot, by engines, apparatus, or other extraordinary means, intercept and monopolize all the fish, some of which would otherwise pass upwards into the waters of the upper proprietors. Each must, to a certain extent, allow his neighbour fair play and equal chances. In this sense, all the owners on the line of a stream have a common interest in the right of fishing those fish which come from the sea; and this common interest arises out of the nature of the thing itself, as in a state of nature a stream is not separated into distinct physical portions having no mutual intercommunication. It will be found that this equality of interest is often disturbed by the erection of wears and similar encroachments.

Where the land on one side of a private stream belongs to a different owner from that on the other side, the presumption of law is, that the soil of the stream up to the middle belongs to each owner on his own side, and the right of each to fish exclusively in his own half of the stream is one of the rights incidental to his ownership.

Public Rivers.—With regard to a public navigable river, the presumption of law is the same as it is in regard to the sea, viz. that the soil or bed belongs to the Crown, but this does not in any way prevent all the subjects from fishing therein, for all have equal rights. Nevertheless, it will be afterwards seen that an

individual may acquire an exclusive right of fishery even in a public river, or in part of the sea.

Kinds of Fishery.—The law of England is hopelessly confused in regard to the terms which distinguish the different kinds of fishery; and no ingenuity can reconcile the authorities. But, as will be afterwards shown, upon a due regard to first principles and the better authorities, the following definitions of the current terms are those which will be established and here used. There are four descriptions of fishery. A common fishery is that kind of right which all the public have alike to fish in the sea or a navigable river. A several fishery is the right of an individual to fish exclusively in a particular water, and it is not necessarily united with the right to the soil, though originally all owners of the bed of a river or water must have had a several fishery in such water as a constituent part of the right of property, until they parted with it to another. A free fishery is the right of fishing along with other individuals in a water. A common of fishery is the right of a person to fish in waters of which the soil belongs to a different person, and is analogous to a common of turbary or pasture. In reality, a free fishery and a common of fishery scarcely differ, except in the mode in which the right was acquired. These distinctions will be further explained in the sequel.

CHAP. II.

FISHERIES IN THE OPEN SEA.

THE OPEN SEA, WHAT—FISHERY, HOW REGULATED—INCIDENTS OF SUCH FISHERY—NATURE OF RIGHT OF FISHERY—WHAT MAY BE FISHED, AND HOW—CONVENTION WITH UNITED STATES—CONVENTION WITH FRANCE.

The Open Sea.—In treating of fishery in the sea, a distinction must be made between what is properly called the open sea, and what may be called the territorial sea, or *mare clausum, i. e.* the sea which is in a certain sense the property of the nation to which the adjacent continent or island belongs, such sea being vested in the Crown, or in the sovereign authority as representing the nation. With regard to the limit from the shore to which this right of property in the territorial sea extends, it seems to be agreed by jurists that this limit is three miles.[1] And the same limit is fixed upon in the convention between Great Britain and France which regulates the use of the fisheries between their respective shores; the fishermen of each country having the exclusive right of fishing within three miles from

[1] Vattel, 128; Selden, 182; Martens, 161.

their own shore undisturbed by those of the other country. The same limit is uniformly adopted by the Court of Admiralty in administering the law with respect to the rules of the sea in British waters.

Fishery, how regulated.—The open sea thus defined, *i. e.* that part of the sea beyond three miles from the continent, is equally available to all comers from every part of the world; whereas the subjects of one country are not entitled to fish within the territorial sea of another country without a licence from the Crown or sovereign authority. And such is the rule adopted by English law.[1]

When disputes of a private character arise in the open sea between the fishermen of different countries, the solution of these disputes is regulated by the law of nature, or rather by what has been called custom, for some custom, founded more or less on the law of nature of necessity springs up at a particular place, adapted to the circumstances, and this custom is held to be binding as between British and foreign subjects. This rule is adopted as the only fair and impartial course, for as each fisherman would naturally act according to the law of his own country, which would be entitled to as much and no more weight than that of the other countries from which his competitors come, a custom which belongs to the law of neither, but which is peculiar to the locality, and by which all may agree to be bound without jealousy, becomes a substitutionary or secondary law, binding on all who act under it. Such a custom, however, in order to be binding, must be clearly

[1] Selden, Mar. Cl. B. II. c. 21; Hale, De Jur. Mar. c. 4.

understood by all those who frequent the locality in question.[1]

The origin and necessity of this rule were thus explained by Chambre, J.[2]:—"There must of necessity be a custom in these things to govern the subjects of England, as well amongst themselves as in their intercourse with the subjects of other countries. The usage of Greenland is held to be obligatory, not only as between British subjects, but as between them and all other nations. I remember the first case upon that usage which was tried before Lord Mansfield, who was clear that every person was bound by it, and said that, were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers; and he held it strongly binding from the circumstance of its extending to different nations. The same necessity must prevail in the South Seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans, and others who resort thither. A few persons may, by compact among themselves, for a particular reason renounce any advantages, and subject themselves to any disadvantages that they please; and this would bind all those who assent to it, but not those who are no parties to the compact."

Such local customs accordingly have often been accepted and acted on by the Courts of this country. Thus, at the Gallipagos Islands, opposite South America, it was a custom that whoever first struck a whale with a droug, or loose harpoon, was entitled to receive half

[1] *Aberdeen Arctic Company* v. *Sutter*, 4 Macq. Ap. C.
[2] *Fennings* v. *L. Grenville*, 1 Taunt. 247.

of the produce from the party who ultimately killed it.[1] At the Greenland Whale Fishery the ruling custom was held to be, that the first harpooner who struck the fish was entitled to the property of the fish only if he continued to hold the whale by the line attached to the harpoon; but if his line broke, and a subsequent harpooner from another ship finished the capture by obtaining possession, the latter was entitled, for it was then a loose fish.[2] In a later case the custom was proved to be subject to the qualification, that to entitle the first harpooner who struck the fish to the property, he must have kept the fish entangled in his lines until it was captured;[3] but he was not divested of this contingent right to the property by a volunteer coming up and officiously striking the fish, thereby causing it to struggle and break from the first line.[4] Such local customs require to be proved, and they will be found to vary from time to time; for as the origin of the custom is referable solely to convenience and common consent, this must obviously vary according as the experience of the parties directly interested enlarges. All that is required is, that the custom be clearly understood and generally adopted by those who resort to the locality.

Where a custom has prevailed in a locality, some difficulty is sometimes felt in ascertaining within what area or geographical limits the custom applies. Thus, it is difficult to define the area of the Northern Whale

[1] *Fennings* v. *Grenville*, 1 Taunt. 248.
[2] *Littledale* v. *Scaith*, 1 Taunt. 243 *n*.
[3] *Hogarth* v. *Jackson*, M. & M. 58; 2 C. & P. 595.
[4] *Skinner* v. *Chapman*, M. & M. 59 *n*.

Fishery; and in a recent case, where it was disputed whether Cumberland Inlet was part of this area, the Court held that *primâ facie* it was, and that it was therefore incumbent on those to prove the fact, who alleged that the custom of fast and loose which was well established at the Northern Whale Fishery either never existed at Cumberland Inlet, or was displaced by some other custom which was well understood there.[1]

Incidents of fishing in open sea.—It seems that in ancient times a licence to go to the whale fishery was exacted by officers of the Admiralty, but a statute was passed declaring such exactions illegal, and subjecting the party so exacting to a fine.[2]

With regard to seamen binding themselves to go on board whaling ships, a summary power of enforcing the contract was given to justices of the peace by a statute of 1810.[3] But that statute is now substantially repealed by the provisions of the Merchant Shipping Acts, which put whaling ships on the same footing as any other ships.

It was once held that fishing boats were exempted from the usual incident of seizure in time of war, out of respect to the industrious order of fishermen employed in them; but in principle this exception has been held untenable, and they are treated like other vessels.[4] And so important was deemed the trade, that fishermen engaged in the fisheries of the kingdom were by statute specially exempted from impressment.[5]

[1] *Aberdeen Arctic Company* v. *Sutter*, 4 Macq. H. L. C.
[2] 2 & 3 Ed. VI. c. 6.
[3] 50 Geo. III. c. 108.
[4] *Young Jacob*, 1 Rob. Ad. 20.
[5] *Payne* v. *Thorogood*, 1 M. & S. 223.

Nature of right of fishery in open sea.—It is of little consequence to discuss the exact nature or correct legal denomination of the right of fishing in the open sea. The utmost that can be done is to give it a name, merely for purposes of classification. It has been generally called a common fishery, or a public common of fishery; which means merely that all can fish in common in the open sea; all have equal rights; one is as good as another, and no one is entitled to exclude another. This seems to be the definition which the words common fishery ought properly to receive. A common of fishery is another right which will be explained hereafter, and differs from a common fishery in precisely the same manner as a highway, which is often called a public easement of way, differs from a private easement of way.

What may be fished, and how.—With regard to fishing in the open sea, there is no limit imposed by the common law or international law either as to the description of fish that may be caught or the means of catching them. The whole contents of the ocean are open to the ingenuity of the fishermen. All that comes to their net is their own, and when brought home there are now none of the somewhat frivolous restrictions on their sale which once prevailed, and fishermen are treated like other merchants at open markets. It is only when disputes occur with other fishermen in the open sea that this absolute right admits of qualification, for in that case the rules of fair play and the authority of any local custom, as above described, must govern such disputes. As regards each fisherman, when the

rights of others are not directly interfered with, he can fish where and how he pleases.

It is true that statutes, more or less ancient, have passed from time to time regulating some matters relating to particular fisheries in the open sea. The chief object of this legislation was the supposed necessity of giving encouragement to such fisheries, and the expedients resorted to were bounties and privileges to those who engaged in them, at the expense of the State. Thus, numerous statutes were passed in favour of the Southern Whale Fishery, the Greenland Whale Fishery, the North Sea and Iceland Fisheries; but nearly all these Acts have been repealed or have expired by effluxion of time, since new views of legislation have gradually become predominant, and artificial stimulants given to trade are discountenanced. It is therefore unnecessary further to notice them, or to notice any other statutes affecting the open sea fisheries, except so far as the statutes affecting the territorial sea fisheries may extend to them; and the subject will be most conveniently treated under the head of territorial sea fisheries.

Convention with United States.—With regard to the fisheries on the coast of North America, it may be merely noticed that a convention was carried into effect between the United States and Her Britannic Majesty under the statute 18 & 19 V. c. 3. The details, which refer to the North American coasts, are of an interest too remote from our immediate purpose to require further notice.

Convention with France.—A stat. 6 & 7 V. c. 79, em-

bodied a convention between Great Britain and France as to the mutual rights of their respective subjects in the interjacent seas when engaged in the fisheries. Regulations are laid down as to the time, place, and mode of fishing. The subjects of each country are entitled to fish exclusively within three miles from their own shore. The Board of Trade may make bye-laws, a copy of which is to be deposited with the clerk of the peace, the collectors of customs, and at the coast-guard stations adjacent. The coast-guard officers are to enforce the provisions. Every person assaulting or obstructing any person authorized to enforce the Act, may be convicted and fined by any justice of the peace in 5*l.* or imprisonment for twenty-one days. The justices of the peace of the nearest county to the place where the offence was committed, or of the place to which the offender is brought, have jurisdiction to award penalties against British subjects, and also against French subjects committing offences within the limits of the British fishery, *i.e.* three miles from low-water mark; and where a French subject commits an offence beyond the British limits, he may be brought into the nearest English port, where he is required to make depositions before a justice, a copy of which is to be sent to the British consular agent at the French port. Where the breach of the rules and bye-laws by a French subject within British limits causes damage to a British subject, a justice of the peace may award compensation (sect. 14). The remedy under this statute is exclusive of all other remedies competent at law.[1]

[1] *Marshall* v. *Nichols*, 18 Q. B. 882.

The stat. 18 & 19, V. c. 101, extended the provisions of the 6 & 7 V. c. 79. By sect. 4 of the 18 & 19 V. c. 101, when a British subject is brought to a French port, charged with an offence against the Articles of Convention, or the rules and bye-laws, the British consul at the place may take the depositions of witnesses against such subject in the same manner as an English justice of the peace, and such depositions are admissible in evidence against such subject in proceedings in England.

By this convention, incorporated in the stat. 6 & 7 V. c. 79, the fishing boats are to be numbered and lettered, and licensed. Trawl-fishing may be carried on at all seasons. The meshes of the net must be one inch and three-quarters from knot to knot, and any supplementary net added to the trawl-net shall have meshes of at least two inches from knot to knot. Trawl-fishing is not allowed where boats are engaged in herring or mackerel drift-net fishing, but must be kept three miles off, and must give way to the latter.

Herring fishing is free all the year round. The meshes of the nets must be not less than one inch from knot to knot.

Mackerel fishing is also free all the year round. The meshes of the nets must be not less than an inch and one-sixth from knot to knot.

As to oysters, see *post*, Chapter V.

CHAP. III.

FISHERIES IN TERRITORIAL SEAS AND NAVIGABLE RIVERS.

GENERAL RIGHT OF PUBLIC TO FISHERY—EXCLUSIVE RIGHT OF A SUBJECT TO FISHERY IN THE SEA—HOW ACQUIRED—WHETHER CROWN SINCE MAGNA CHARTA CAN GRANT SEVERAL FISHERY IN SEA—WHAT FISH MAY BE CAUGHT IN SEA—CROWN'S RIGHT TO ROYAL FISH—YOUNG FISH OTHER THAN SALMON—HERRING, COD, LING, ETC.—PILCHARDS—RIGHT OF FISHERMEN TO USE SHORE, ETC.—DAMAGE DONE WHILE FISHING—OBSTRUCTION TO NAVIGATION—FISHERY IN PUBLIC NAVIGABLE RIVERS—WEARS AND FIXED APPARATUS—LEGALITY OF WEARS—STATUTES AS TO WEARS—FIXED NETS—ILLEGALITY OF WEARS AND FIXED NETS AT COMMON LAW—SALE OF FISH.

General right of public to fishery.—The right to fish in the British or territorial seas, and in all public navigable rivers in England, belongs *primâ facie* to all the public of the United Kingdom. As regards the soil beneath the sea and navigable rivers, this is *primâ facie* vested in the Crown, and the right of fishing was also originally vested in the Crown, but has long since ceased to be so, except in an imperial or titular sense, *i.e.* in so far only as the Crown is the representative of the public, and the Crown's right does not in any way qualify or restrict the absolute right of the public to fish within the limits. The Crown has now no more right to exclude the public

from fishing there than the owner of the soil of a highway has to exclude the public from walking upon or using that highway.

"Many of the king's rights," as Bayley, J. observes, are to a certain extent for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing, and it is so in highways along which all his subjects have the right of passage, and the king can make no modern grants in derogation of those rights."[1]

The subjects of a foreign state have not the same right to fish in the territorial seas as native subjects, but require a licence from the Crown, as already stated.[2]

Exclusive right of subject in sea and public rivers.—As regards the right of the subjects of the United Kingdom to fish in the territorial seas and all navigable rivers, the rule is, that *primâ facie* every subject is absolutely entitled to fish there. But though this is the general rule, it is nevertheless competent for an individual subject to establish his exclusive right to fish in arms of the sea and navigable rivers; in other words, to exclude the public. The *onus probandi* is, however, always upon such individual to prove affirmatively this exclusive right.

"The right of fishing in the sea," says Hale, C. J.[3] "and the creeks and arms thereof, is originally lodged in the crown, in like manner as the right of fishing in a private or inland river is originally lodged in the

[1] *Blundell* v. *Catterall*, 5 B. & Ald. 304.
[2] See *ante*, p. 6.
[3] De Jur. Mar. p. 1, c. 4.

owner thereof. But although the king is the owner, and, as a consequent of his propriety, hath the primary right of fishing in the sea or creeks and arms thereof, yet all the king's subjects in England have regularly a liberty of fishing in the sea and the creeks and arms thereof as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers where the king or some particular subject hath gained a propriety exclusive of that common liberty, either by the king's charter or grant, or by custom and usage or prescription." So Lord Mansfield also says,[1] "In navigable rivers the proprietors of the land on each side have not the fishery, but it is common. It is *primâ facie* in the king, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him unless he can prove such a prescriptive right. Here it is claimed and found; it is therefore consistent with all the cases that he may have an exclusive privilege of fishing, although it be in an arm of the sea." Yates, J. added, "What is otherwise common may, by prescription, be appropriated. Moreover the case of the river Banne (Davis 55) was well decided, and it appears by it that the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea."[2]

[1] *Carter* v. *Murcot*, 4 Burr. 216.

[2] See also the point assumed in Lord Fitzwalter's case, 1 Mod. 106; 3 Keb. 242; *Bagot* v. *Orr*, 2 B. & P. 479; *Mayor of Orford* v.

How acquired.—As to the origin of several fisheries in the sea, Hale thus explains it:[1]—"Although the king hath *primâ facie* this right on the arms and creeks of the sea *communi jure* and in common presumption, yet a subject may have such a right. And this he may have two ways. 1. By the king's charter and grant; and this is without question. The king may grant fishing within a creek of the sea, or in some known precinct that hath known bounds, though within the main sea. . . . 2. The second right is that which is acquired or acquirable to a subject by custom or prescription. A subject may have by prescription the interest of fishing in an arm of the sea, in a creek or port of the sea, or in a certain precinct or extent lying within the sea." After giving "precedents touching such rights of fishing in the sea, and arms and creeks thereof belonging by usage to subjects, the most whereof appear to be by reason of the property of the very water and soil wherein the fishing is, and some of them even within the ports of the sea," he adds, "Whereby it is admitted though *primâ facie* an arm of the sea be in point of propriety the king's, and *primâ facie* it is common for every subject to fish there, yet a subject may have by usage a several fishing there, exclusive of that common liberty which otherwise of common right belongs to all the king's subjects."

This right of excluding the public from the common

Richardson, 2 H. Bl. 182; *Rogers* v. *Allen*, 1 Camp. 309; *Vivian* v. *Blake*, 11 East, 263; *O'Neill* v. *Allen*, 9 Ir. C. L. Rep. 132; *Allen* v. *Donnelly*, 5 Ir. Ch. Rep. 229; *Little* v. *Wakefield*, 8 Ir. C. L. Rep. 279; 11 Ib. 63; *Malcolmson* v. *O'Dea*, 9 H. L. Cas.

[1] De Jur. Mar. c. 5.

fisheries of the sea and navigable rivers is thus based on a grant, actual or supposed, by the Crown, the right of the Crown to such fisheries being said to have been originally part of the prerogative of the Crown.[1] Whatever may have been the origin of this right, it is too late to dispute it, as the proposition has been assumed in so many cases. Not only is it competent for an individual to establish this exclusive right to fish in the arms of the sea and navigable rivers, but it is some evidence to warrant a presumption of a legal grant that the party has exercised the right unquestioned for a space of thirty years and upwards.[2]

The right of fishing in a navigable river or the sea is thus a franchise originally granted by the Crown. A well-known distinction exists between such as upon forfeiture may exist in the Crown, and therefore may be capable of regrant, and such as cannot exist in the Crown, but only in a grantee from the Crown, and therefore become actually extinct upon forfeiture.[3] A warren, park, fair, market with toll, are instances of the former; these the Crown may hold as a subject may, but would not have them generally by its prerogative. The franchises of waif, estray, wreck, are instances of the latter, which, having been granted out in their particular limits by the Crown, and the grant being forfeited, merge in the Crown's general prerogative right, and do not any longer exist as separate franchises. It

[1] Com. Dig. Prerog. D. 50; 2 Rol. Ab. 170, l. 20; Dav. 56.

[2] *Little* v. *Wingfield*, 11 Ir. Co. L. Rep. 63; 2 & 3 Wm. IV. c. 71, § 1.

[3] *Case of the Abbot of Strata Mercella*, 9 Rep. 24 a; *Heddy* v. *Wheelhouse*, Cro. Eliz. 591; *R.* v. *Mayor of London*, 1 Show. 230.

has not been clearly decided to which of these classes the franchise of several fishery in the sea belongs.[1]

There is a ground on which it has sometimes been said that an individual may acquire an exclusive right of fishing in the arms of the sea or navigable rivers—viz. that of custom or usage—the foundation of which is some supposed ancient agreement between an individual and inhabitants of the district, whereby the latter, for some supposed consideration, abandoned on behalf of the public their common law rights to the individual owner.[2] It is, however, difficult to see how this ground can now be sustained, for it is obvious that no agreement of any number of local inhabitants can ever bind the public;[3] and it is well settled that, as regards the analogous public right of a highway, the maxim "once a highway always a highway" applies, and no proof of nonuser is allowed to disprove the existence of a highway.[4]

The right of an exclusive fishery in the sea is generally coupled with the exclusive ownership of the shore between high and low water mark, which it is well settled may exist in the subject as a grantee of the Crown, either in connexion with the adjacent land or separately therefrom. But though a subject has an exclusive property in the soil of the shore, it does not follow that he has an exclusive right of fishery there, for

[1] *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339.

[2] Co. Litt. 113, a. b.; *Chad* v. *Tilsed*, 5 Moore, 185; *Mayor of Orford* v. *Richardson*, 4 T.R. 439; Co. Litt. § 169, 170; Lib. Intrat. 139; Plowd, Case of Mines.

[3] Per Brady, L.C. in *Allen* v. *Donelly*, 5 Ir. Ch. Rep. 244.

[4] *Dawes* v. *Hawkins*, 8 C.B. N.S. 848.

the two rights are separable. He may possess one or both or neither, and in general it will be a question of construction of the ancient grants under which he claims, explained by the user subsequent to their date, what is the measure of his right.

Right of the Crown since Magna Charta to grant several fishery in the sea.—Though it is no longer an open question whether the Crown could make a valid grant to a private individual of a several fishery in the sea or a navigable river, yet it has been doubted whether the Crown could do so after Magna Charta. The great charter of Hen. III. (1217) c. 20, says, "Nulla riparia de cetero defendatur nisi illa quæ fuerint in defenso tempore Henrici regis avi nostri per eadem loca et eosdem terminos sicut esse consueverunt tempore suo." "No banks shall be defended from henceforth but such as were in defence in the time of King Henry our grandfather, by the same places and the same bounds as they were wont to be in his time." Of this head of the Charter, Coke says,[1] "That is, that no owner of the banks shall so appropriate or keep the rivers several to him to defend or bar others, either to have passage or fish there, otherwise than they were used in the reign of Hen. II. This statute, says the Mirror, is out of use, for several rivers have been appropriated and put in defence which used to be common to fish in and use in the time of Hen. II." The above passage has been generally construed as restricting the right of the Crown to exclude the public in future from their common law right of fishing in the sea and navigable rivers. And it

[1] 2 Inst. 30.

is much more natural so to construe it than to assume as has been hinted by a learned judge, that "it was levelled rather against the acts of the subjects, who from ownership of the adjacent lands or otherwise sought to assert rights over the rivers, than to amount to a restriction of any right or prerogative of the Crown."[1] Many *dicta* support the construction that the Crown's right was restricted by the above clause in Magna Charta.[2]

The difficulty has arisen chiefly in cases where a grant of the Crown exists subsequent to Magna Charta, but there is nothing to show whether it is a new grant or a continuation of some grant which may have existed prior to Magna Charta. Wherever evidence is given of the user of a several fishery for a long period of time, as for two centuries, "it is not too much to presume," as Hayes, J. well said in *Malcolmson* v. *O'Dea*, "after the lapse of all that time, and after all that was done during a long period, that the Crown had in it what it undertook to grant, and that the subject of the grant was vested in the Crown as parcel of its ancient inheriance rather than as a bare trust for the public; this latter suggestion conveying, as it does, not only the imputation of having asserted a falsehood, but also the

[1] Per Hayes, J. *Malcolmson* v. *O'Dea*, 11 Ir. C. L. (not yet reported).

[2] Per Bayley, J. *Duke of Somerset* v. *Fogwell*, 5 B. & C. 884; 2 Bl. Com. 39; Hale's De jure Maris, 18 &c.; dictum in *Rogers* v. *Allen*, 1 Camp. 268; Holt, C. J. *Warren* v. *Matthews*, 1 Salk. 357; 6 Mod. 73; Bushe, C. J. *Duke of Devonshire* v. *Hodnct*, 1 Huds. and Br. 331; Brady, L.C. in *Allen* v. *Donelly*, 5 Ir. Ch. R. 244; the tenor of *Blundell* v. *Catterall*, 5 B. & Ald. 268; the majority of the Irish judges in *Malcolmson* v. *O'Dea*; assumed by Willes, J. and House of Lords in the last case, 9 L. T. N. S. 93.

imputation of a gross breach of trust on the part of the Crown and its advisers."[1]

The result seems to be that which was well expressed in the same case by O'Brien, J.[2] "Since Magna Charta the Crown could not lawfully abridge the right of the public to fish in any tidal and navigable part of a public river, nor create *de novo* a several and exclusive fishery in any such part which had not, previous to Magna Charta, been appropriated for that purpose, and from the right of fishing in which the public had not before that time been excluded; although if such several fishery had been created previous to Magna Charta it might be subsequently granted by the Crown. Indeed, the contrary doctrine would be attended with very serious results. If a several and exclusive fishery in a tidal navigable river could be created *de novo* by the Crown at any time after Magna Charta, why should not the Crown have the same power now? It is true, as a general rule, that the grant of a several fishery after Magna Charta, together with clear and satisfactory proof of subsequent use and enjoyment of that fishery under the grant, are grounds for presuming that the Crown was entitled to make such grant, and was then seised of such several fishery, and that accordingly such several fishery had existed before Magna Charta."

The view that a grant subsequent to Magna Charta is good evidence of a grant prior to Magna Charta has been confirmed on a more recent occasion[3] by the House

[1] Per Hayes, J. *Malcolmson* v. *O'Dea*, 14 Ir. C. L.
[2] *Malcolmson* v. *O'Dea*, 14 Ir. C. L.
[3] *Malcolmson* v. *O'Dea*, 9 H. L. Cas.; 9 L. T. N. S. 93.

of Lords, which adopted the opinion of Willes, J. who says, "That a several right of fishery in a public navigable river may lawfully exist is clear. The soil of navigable tidal rivers, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public. But for Magna Charta, the Crown could by its prerogative exclude the public from such *primâ facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the Great Charter left untouched all fisheries which were made several to the exclusion of the public by act of the Crown not later than the reign of Henry II. If evidence be given of long enjoyment of a fishery to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is not that you say this is a usurpation, for it is not traced back to the time of Henry II. but that you presume that the fishery, being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory."

The precise meaning of this chapter of Magna Charta was a good deal discussed in the recent case in Ireland already referred to,[1] in the course of which some of the preceding opinions of learned judges were given, and which arose in this way. The plaintiff brought an action for breaking and entering his several fishery in the river Shannon, and the defendant set up as a defence

[1] *Malcolmson* v. *O'Dea*, 14 Ir. C. L. R.

that the river was a navigable river, and the public had a right to fish there. The plaintiff put in evidence a patent of Queen Elizabeth, purporting to grant the several fishery in question; and the defendant contended, among other things, that the sovereign since Magna Charta had no power, by patent or otherwise, to create a several fishery in a navigable river. It was held in the Court of the Irish Exchequer Chamber that the grant by Elizabeth, and user under it, were no evidence of a grant before Magna Charta. But the House of Lords reversed this judgment, and held that the fact of the Crown dealing with such a right in the days of Elizabeth was *primâ facie* evidence that the right had originated in a legal manner; that is, had been exercised before the date of Magna Charta.[1]

What Fish may be caught in the Sea.—*Primâ facie* any one of the public may catch in the sea and navigable rivers every kind of fish or inhabitant of the main without any restriction or qualification; and where an individual in the manner before mentioned has acquired an exclusive or several right of fishery in these places he also may do the same. But there is an exception at common law, and confirmed by statute, with regard to what are called royal fish. Certain statutes, more or less ancient, also imposed restrictions as regards young fish; but these are now nearly all repealed, and the chief restriction now in force applies to salmon, which will be treated of separately.[2]

Crown's Right to Royal Fish.—At common law, the

[1] See *Malcolmson* v. *O'Dea*, 9 L. T. N. S. 9.; 9 H. L. Cas.
[2] See *post*, Chap. VIII.

Crown's right to the royal fish caught in the territorial seas was recognised as a franchise.[1] The right was confirmed by statute, for 17 Ed. II. st. 1 (A.D. 1324), enacts that the king shall have wreck of the sea throughout the realm, whales and sturgeons taken in the sea or elsewhere within the realm, except in certain places privileged by the king. Hale[2] includes the porpoise as a royal fish, and also great fish that come under no known denomination; but he seems to refer to what was the law before the above statute. Certain customs also once prevailed as to dividing the whale, and giving the head to the king and the tail to the queen. It is to be observed that it is only whales and sturgeons caught within the realm which so belong to the Crown; in other words, within the limit of the territorial seas; and hence, if the whales are caught in the open sea, as in the Greenland fisheries, they belong not to the Crown, but to the first taker, according to the rules or customs in force in those localities.[3]

This franchise of the Crown as regards whales and sturgeons may be conveyed to the subject, who may accordingly establish his right to the royal fish by grant or by prescription. By prescription he may have the right either in gross, or as appurtenant to an honour, manor, or hundred.[4]

Young Fish other than Salmon.—The statute 1 Eliz. c. 17 imposed restrictions on the taking and killing of

[1] Pl. Com. 315; Staun. Prerog. c. 11; Bract. 3, 3, 5; Britt. 26 b.
[2] De Jur. Mar. c. 7.
[3] See *ante*, p. 7.
[4] Hale, De Jur. Mar. c. 7.

young fish and spawn, including salmon. That was a temporary act, which was finally made perpetual by 3 Ch. I. c. 4, § 4. But the Salmon Fisheries Act, 1861, 24 & 25 Vict. c. 109, Sched., after repealing the statute of 1 Eliz. c. 17, so far only as regards salmon, in the next sentence repealed the 3 Ch. I. c. 4, § 1, which was the only enactment which kept 1 Eliz. alive and made it perpetual. Hence the sole prop of the statute 1 Eliz. c. 17 was thereby taken away.[1] The Salmon Fisheries Act, 1861, also repealed many subsequent statutes dealing with young and unseasonable fish, so that, except as regards salmon, as that word is defined in the Act of 1861, the only restrictions now imposed on the destruction of young or unseasonable fish are contained in the statute of 1 Geo. I. st. 2, c. 18. Formerly there were various regulations contained in statutes as to herrings, oysters, eels, pilchards; and though there is still a series of statutes in force as to herrings, the only other fish protected by statute is the salmon and the fish included in the statute of 1 Geo. I. st. 2, c. 18.

The only statute which, as already stated, now controls to a small extent the right of fishers in the sea to catch young fish, is 1 Geo. I. st. 2, c. 18. Everything in that statute relating to salmon was repealed by the Salmon Fisheries Act, 24 & 25 Vict. c. 109, and relating to the supply of fish to the Market of Billingsgate by 9 & 10 Vict. c. cccxlvi.; and though, owing to the

[1] The authors of the Statute Law Revision Act, 26 & 27 Vict. c. 125, treat the act of 1 Eliz. c. 17 as still in force; but if the premises above stated are correct, it is difficult to see how the conclusion can be resisted that the statute is repealed, whether this was done inadvertently or not.

multiplicity of the subsequent statutes on the subject of fish, it is difficult to speak with certainty how far the outstanding enactments may not be further qualified, there seems to be no statute which directly or indirectly repeals the earlier sections. Those unrepealed sections relate to the size of nets and the sale of unsizeable fish.[1]

Herring, Cod, Ling, &c.—The herring fisheries are

[1] The enactments are as follow: If any person or persons shall use at sea upon the coast of England any trawl-net, drag-net, or set-net whatsoever, for the catching of any kind of fish (except herrings, pilchards, sprats, and lavidnian) which hath any mesh or moke of less size than three inches and an half at least from knot to knot, &c. all and every such person or persons so offending shall forfeit all and singular such net or nets so used contrary to the intent and meaning hereof, and also for every such offence the sum of £20, and in default of payment of the said £20 or of sufficient distress the offender to be imprisoned in like manner during the space of twelve months.—1 Geo. I. st. 2, c. 18, § 4.

Every master of a smack, boat, ship, &c. in which fish shall be brought to shore contrary to the act, incurs a penalty of £20.—*Ibid.* § 2. But eels, stockfish, anchovies, sturgeon, botarge, and cavear are exempted from the act, § 3. Of the penalties, one moiety shall go to the informer, and the other moiety thereof to the poor of the parish.—*Ibid.* § 5. Such net or nets shall, by warrant of a justice, be publicly burnt.—*Ibid.* § 6.

If any person or persons shall bring to shore in England, sell, offer or expose to sale, or shall exchange for any other goods, matter, or thing, any unsizeable fish, that is to say: bret, turbot, brill or pearl-codlin, whiting, mullet, bass, plaice, soles, or flounders, which shall not be of the sizes following: bret or turbot, 16 inches; brill or pearl, 14 inches; codlin, 12 inches; whiting, 6 inches; bass or mullet, 12 inches; sole, 8 inches; plaice or dab, 8 inches; flounder, 7 inches; all and every person so offending shall, for every such offence, forfeit all and every such unsizeable fish so brought on shore, sold, or offered or exposed to sale, or exchanged, as aforesaid, to the poor of the parish or place where such offence shall be committed, and also shall for every such offence forfeit and pay the sum of 20*s.* &c.—*Ibid.* § 7. Imprisonment is in lieu of the penalty, § 8. The prosecution must be commenced within one month after the offence is committed, § 9.

now the chief sea fisheries subjected to special control. Certain commissioners are appointed for the purpose of supervising this branch of the fisheries, and many minute regulations are laid down in the statutes and in their bye-laws, as to the packing, salting, and exporting of herrings. The commissioners are also empowered to regulate the cod and ling fisheries.[1] The herring fishery is lawful all the year round.[2]

The convention between the United Kingdom and France fixed the size of the nets to be used in the herring fishery at not less than one inch from knot to knot.[3] The statute 14 & 15 Vict. c. 26, § 6, prohibited trawl nets, and all nets except drift nets, to be used in the British herring fishery. The statutes in force contain numerous details relative to the herring trade which do not fall within the scope of this work.[4]

Pilchards.—The pilchard fishery carried on in the bay of St. Ives, in the county of Cornwall, is regulated by the statute 4 & 5 Vict. c. lvii. That statute contains many minute regulations as to the mode in which the fishing-boats are to be engaged; but a statement of the details is not within the limits of this work.

Rights of Fishermen in sea and public Rivers as to adjacent Land.—Though the public have a right to fish in the sea and navigable rivers, they have no right to make use of the adjoining land for the purposes of

[1] 1 Wm. IV. c. 54, § 4.

[2] As to Scotland, see *post.*

[3] See *ante* p. 13.

[4] The statutes in force in England are: 48 Geo. III. c. 110; 55 Geo. III. c. 94; 1 Geo. IV. c. 103; 1 & 2 Geo. IV. c. 79; 5 Geo. IV. c. 64; 1 Wm. IV. c. 54; 6 & 7 Vict. c. 79; 10 & 11 Vict. c. 91; 14 & 15 Vict. c. 56; 21 & 22 Vict. c. 69. As to Scotland, see *post.*

their fishery, either in the way of fixing their nets by stakes, drying their nets, drawing them ashore, or otherwise. Such a right would be inconsistent with the nature of permanent private property.[1] In some places, however, a custom has been held good according to an ancient case in the Yearbooks,[2] by which the fishermen of certain localities were entitled to dig the soil to place stakes for drying their nets. The opinions of the judges in that case as regards the general right are loose, and would almost warrant the right as incident to a public fishery generally. But Hale[3] treats that case as one of local custom for the fishermen of Kent only.[4] Indeed, as there is no right of towage on the banks of navigable rivers[5] incident to navigation, which is a much higher right than that of a public fishery, it would follow that there is no similar implied right of using the land in furtherance of a fishery.[6] And a person who has a mere common of fishery cannot cut the grass growing at the edge of the banks.[7] Nevertheless, the custom has been held good in the case already mentioned of the fishermen of Kent,[8] and in a similar case where fishermen of a certain vill were held entitled to dry their nets on a particular close;[9]

[1] Per Holroyd, J. in *Blundell* v. *Catterall*, 5 B. & Ald. 299.
[2] Yearbook, 8 Ed. IV. 19.
[3] De Port. Mar. 86.
[4] See also, per Holroyd, J. in *Blundell* v. *Catterall*, 5 B. & Ald. 296.
[5] *Ball* v. *Herbert*, 3 T.R. 253.
[6] See also *Blundell* v. *Catterall*, 5 B. & Ald. 295.
[7] Yearbook, 13 Hen. VIII. 15 b.
[8] *Supra*, Bro. Abr. Customs pl. 46.
[9] Yearbook, Tr. 15 Ed. IV. f. 29 A. pl. 7; *Blundell* v. *Catterall*, 5 B. & Ald. 295; *Padwick* v. *Knight*, 7 Exch. 861.

and in another case to dig gravel on the shore for ballast.[1] In cases of grants to an individual, it is often a question of construction whether a right to use the banks was impliedly granted, and this depends on whether it was necessary to the exercise of the fishery that such banks should be used.[2] If rights of this kind have been exercised for thirty years in case of a common, or twenty in case of an easement, this user will be evidence of a grant.[3]

Thus, the lessees of a fishery in the navigable river Derwent brought an action on the case against the lord of the manor, for disturbing them in the right of drawing nets to land on the river banks. The lands of the defendant had been conveyed by the owner of the fishery in 1774, without any special reservation as to the right of landing nets. The plaintiffs had, however, for thirty years and upwards been in the practice of so using the banks. The court held that it was for a jury to presume from the evidence of enjoyment a grant of the right to land nets to the owner of the fishery by some owner of the close since 1776. Dallas, C. J. said: "A mere lapse of time would not of itself raise against the owner the presumption of a grant. When it does, the inference is also drawn from accompanying facts; and here, where there is no direct evidence whether or not the owner of the land had any knowledge of what passed, the inference to be drawn must in a peculiar degree depend on the nature of the

[1] *Mayor of Lynn Regis* v. *Taylor*, 3 Lev. 160.

[2] See *R.* v. *Ellis*, 1 M. & S. 666. See also, Co. Litt. 59 b; *Lifford's case*, 11 Rep. 52; 1 Wms. Saund. 323 n (6); Shep. Touch. 89.

[3] 2 & 3 Wm. IV. c. 71.

accompanying facts; and the presumption in favour of a grant will be more or less probable as it may be more or less probable that those facts could not have existed without the consent of the owner of the land. The circumstances proved in the present case were sufficient to leave to a jury as circumstances from which the knowledge of the owner, and his acquiescence on the supposition of a preceding grant, might fairly be presumed.'[1]

Damage done while Fishing.—Where a person *bonâ fide* exercising his right of fishery does damage to adjoining property, he is expressly exempted from punishment under the Malicious Trespass Act, 24 & 25 Vict. c. 97. For, by sect. 52, it is enacted that nothing in that act contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass not being wilful and malicious committed in hunting, fishing, or in the pursuit of game; but every such trespass shall be punishable in the same manner as if this act had not been passed." It is true that the party may sometimes be liable in a civil action, but if he acts *bonâ fide* he cannot be punished as for a criminal offence in a summary way by justices of the peace.

Fishing as an Obstruction to Navigation.—The right of fishery in the sea and navigable rivers is subordinate to the right of navigation, and where both are incompatible the fishermen must give way to the navigation of vessels.[2] Each party must, however, use his right so as not to interfere with the other; and hence, if there

[1] *Gray* v. *Bond*, 2 B. & B. 667.
[2] Anon. 1 Campb. 517 n.

is ample room for a navigating vessel to pass, it ought to do so, without interference with the station of the fishing vessels. In the sea no collision is likely to occur; but in navigable rivers it may be often necessary for navigating vessels to interfere with the fishing vessels. Where the rights of both parties are incompatible, the above rules must be observed; the navigator is entitled to pass at all hazards; but he must do the least possible injury to the fisherman, for he is in the exercise of a lawful right, though it is to the above extent a subordinate one.

Fishing in Public Navigable Rivers.—The right of the public to fish in public navigable rivers is put on the same footing as the right to fish in the territorial sea, and the creeks and arms thereof. None of the authorities seems to define what is a public navigable river, though, *primâ facie*, it would seem to be generally regulated by the test whether the tide ebbs and flows. Hale observes that an arm of the sea is where the sea flows and reflows.[2] Lord Mansfield observed,[1] "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows that are not navigable rivers, and the place in question may be a creek in one's private estate." But this was said in reference to an attempted indictment for not repairing a creek where the tide used to flow and reflow.

It can scarcely be doubted that there are, or may be, places where the tide does not flow and reflow, and yet

[1] De Jur. Mar. p. 1, c. 4.

[2] *Mayor of Lynn v. Turner*, Cowp. 86; Lofft. 556.

are navigable rivers. In such a case the law seems to be, that, though the river may be navigable, and thereby a highway for the Queen's subjects as far as navigation is concerned, yet as regards the right of the public to fish there, that is bounded by the limit of the flow of the tide. This seems to follow from the authorities.[1]

Wears and Fixed Apparatus for Fishing in Rivers.—The right to make use of the shore is, as has been seen, not an incident of a right of fishing in the sea, or a public navigable river, for the shore beyond high water mark is private property, and sometimes the foreshore is so also. Nor, on the other hand, would the owner of the shore be entitled to fix any apparatus to his land, stretching into the sea, so as thereby to facilitate and enlarge the right of fishing which he has as one of the public. If he were to do so, this would be a nuisance

[1] Hale (De Jure Maris, c. 2, p. 8) says: "For as the common high ways in the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and, as the highways by land are called *altæ viæ regiæ*, so those public rivers for public passage are called *fluvii regales*, and *haut streams le roy*; not in reference to the propriety of the river, but to the public use; all things of public safety and convenience being in a special manner under the king's care, supervision, and protection. And, therefore, the report in Sir John Davies of the Piscary of the Bann, mistakes the reason of those books that call them streams *le roy*, as if they were so called in respect of propriety, as 19 Ass. 6, Dy. 11; for they are called so, because they are of public use, and under the king's special care and protection, whether the soil be his or not." In the case of the Fishery of the Bann, Dav. 57, it is said: "Every navigable river, so high as the sea ebbs and flows in, it is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative; the reason for which the king hath an interest in such navigable river so high as the sea flows and ebbs in it is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows.

and an obstruction to navigation, and also to other fishermen, who, if they found the apparatus prevented them exercising their own public rights of fishery, might abate it. If, however, the owner of the shore, as frequently happens, has a several fishery in the sea or mouth of a river, there is nothing to prevent him making use of the shore in this manner, provided only he does not interfere with the navigation. It is seldom, however, that any structure or permanent apparatus is attached to the sea shore, where the sea is open, though a practice has existed from the most ancient times of erecting wears in navigable and other rivers, the object of which was to facilitate the catching of fish.

The right at common law of a riparian owner, who is owner of the several fishery in a navigable river and the bed of the river, to erect a wear, by which is meant a fixed structure in the bed of the river, the object of which is, either by means of an apparatus which there catches them, or by impeding their progress, to prevent all or nearly all the fish from passing upwards to the fisheries of the upper owners is left somewhat obscure on the authorities. The obstruction, so far as it hinders the navigation, may be said to be clearly a nuisance, and as the interests of navigation are paramount, this effect ought first to be considered; but so far as it affects only the fisheries of the other owners of the river, there is also ground for saying it is illegal, at least a cause of action at common law. Such a doctrine seems to be assumed in several cases. The Crown, however, seems, in ancient times, not only to have granted a several fishery to an individual in navigable rivers, but also to

have granted to the subject the right to erect a wear, and this was found so prejudicial that Magna Charta contained an express clause on the subject. The effect of that statute on the existing law is stated by Hale.[1]

[1] Hale (De Jur. Mar. c. 5) says: "Though the king hath, *primâ facie* the right in the arms and creeks of the sea, *communi jure*, and in common presumption, yet a subject may have such a right. And this he may have two ways:—1. By the king's charter or grant, and this is without question. 2. The second right is that which is acquired or acquirable to a subject by custom or prescription." After referring to a case, he proceeds: "Upon which record these things are observable:—1. That a subject may by prescription have a wear in the sea, and consequently have an interest below the low water mark, for probably wears be such. 2. That yet, if it be a nuisance to the passage of ships, it may be abated. In many considerable arms of the sea that were navigable rivers, and flowed and reflowed with salt water, divers persons had wears and local fishing sluices. It is true that by the statute of Magna Charta, c. 23, 'omnes kidelli deponantur decetero penitus per Thamisiam et Medwayam per totam Angliam nisi per costeram maris,'—'All wears from henceforth shall be utterly put down by Thames and Medway, and throught all England, except by the sea-coast.' And this statute was seconded with others that were more effectual, viz. 25 Ed. III. c. 3; 1 Hen. IV. c. 12; 12 Ed. IV. c. 7. And by force of these statutes, wears that were prejudicial to the passage of vessels were to be pulled down, and accordingly it was done in many places. But that did no way disaffirm the propriety, but only remove the annoyance, which, as before is shown, was not to be allowed in an inland river, if it be a common passage. The exception of wears upon the sea-coasts, and likewise frequent examples, some whereof are before mentioned, make it appear that there might be such private interests, not only in point of liberty, but in point of propriety, on the sea coast, and below the low-water mark, for such were regularly all wears. But as by the statutes 25 Ed. III. c. 4; 45 Ed. III. c. 2; 1 Hen. IV. c. 11, and other statutes, the erecting of new wears and hancing of old is provided against in navigable rivers; and by other instatutes particular provision is made against wears new or old erected on particular posts; so, by the statute 3 Jas. I. c. 12, all new wears erected upon the sea-shore, or in any haven, harbour, creek, or within five miles of the mouth of any haven or creek, are prohibited under a penalty. But in all these statutes, though they prohibit the thing, yet they do admit that there may be such an interest lodged in a subject, not only in navigable rivers, but even in the ports of the sea

Statutes as to Wears.—Coke, in reference to this clause of Magna Charta, says: "*Kidelli* is a proper word for open wears, whereby fish are caught, and it appeareth by Glanvil that this purpresture was forbidden by the common law, purpresture meaning the encroaching or making several to oneself that which ought to be common to many.[1] The "kidelli" did not mean such wears as might obstruct the navigation.[2] Whether, therefore, wears are illegal or not at common law, they may still be lawfully maintained, and their legality is undoubted, if they are of ancient origin.

The right to maintain a wear in a public navigable river came in question in a case in 1838, as to the river Severn.[3] A wear existed on that river between Worcester and Shrewsbury which was claimed by the plaintiff, and the defendant threw it down as a nuisance, on the ground that it obstructed the navigation. This trespass was the cause of action. The plaintiff at the trial gave evidence of the antiquity of the wear, beginning with Doomsday-

tself, contiguous to the shore, though below the low-water mark, whereby a subject may not only have a liberty, but also a right or propriety of soil. But yet this that I have said must be taken with this allay, which I have in part premised:—1. That this interest or right in the subject may be so used as it may not occasion a common annoyance to passage of ships or boats; for that is prohibited by the common law, and these several statutes before mentioned, viz. erecting new wears, inhancing old, fixing of pikes or stakes and the like, in order to fishing; for the *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers or arms of the sea are affected for public use. 2. That the fishing that a subject hath in this or any other private or public river or creek, fresh or salt, is subject to the laws for the conservation of fish and fry, which are many."

[1] 2 Inst. [2] Chester Milt Case, 10 Rep. 137 b.

[3] *Williams* v. *Wilcox*, 8 A. & E. 314.

book, and contended that, whatever be the power of the Crown in modern times, there was a right in the Crown before Magna Charta, to erect or grant to a subject the right to erect a wear, even though it might obstruct the navigation. The main question, therefore, was, as to whether the right of the Crown, even before Magna Charta, to erect wears was subject to the paramount right of the public to have freedom of navigation. The Court inclined to hold that, at Common Law, the power of the Crown, even before Magna Charta, was subordinate to the right of the subject to free navigation, and that the Crown could not by any grant derogate from this public right of navigation, and that his grants must give way whenever the interests of navigation required it. The Court, however, also held that the passage in the Great Charter as to *kidelli* did not apply to wears which obstruct navigation, but only to open wears for catching fish. That that statute, therefore, left the law as it stood before, and wears would have been illegal altogether, but for u subsequent statute of 25 Ed. 3, c. 4, which directed the destruction of all wears which had been set up in the time of Edward I. and subsequently. This statute, the Court held, was a compromise of existing interests illegally acquired, and impliedly legalized all wears made before that time, though, in strictness, they were illegal at Common Law. They were not only protected against the specific measures mentioned in that act, but rendered absolutely legal. Hence, it follows, that if a wear in a public navigable river be shown to be as ancient as the statute 25 Ed. III. it is legal.

It sometimes happens that the documentary evidence of Crown grants does not proceed back so far as Magna Charta; nevertheless, if there is clear evidence of user back for a certain period, and evidence of a several fishery existing in the Crown at the furthest point, this will be presumptive evidence that the fishery was originally granted before Magna Charta. Thus, when the Duke of Devonshire brought an action of trespass for breaking his several fishery in the Blackwater, in the county of Cork, he produced a patent of James I. which granted to his predecessors the soil and bottom of the river, which was a navigable river, and enjoyment under the patent was shown. The Court held that this was evidence that the Crown was seised in fee of the soil and bottom, and of the several fishery at the time of the making of the patent. Bushe, C. J. observed: "It is urged that there can be no grant of a several fishery in a navigable river since Magna Charta, but that position is not correct; such a fishery, indeed, cannot since that time be created, but, if it has existed before, it may be granted now, and *non constat* but that James the First was seised of a several fishery at the time of his grant, which would have passed by his patent."[1] So, with respect to the several fishery in the river Shannon, at Limerick, it was held that the existence of a grant of Elizabeth (there being no antecedent evidence) coupled with subsequent user, was good evidence of a grant by the Crown before Magna Charta.[2]

[1] *D. Devonshire* v. *Hodnett*, 1 H. & Br. 332.
[2] *Malcolmson* v. *O'Dea*, 9 H. L. Cas.

In another case[1] in 1806, the plaintiff sued the defendant for damaging his right of fishery in the river Ribble by wrongfully continuing a wear or dam across the river lower down, by which salmon and other fish were prevented from coming to the plaintiff's fisheries and spawning there, &c. The facts proved were, that the defendant was entitled, according to the evidence of title he produced to maintain a wear at the spot in question, but this wear had been made of brushwood, whereas he had lately converted it into a stone wear of solid masonry. When the brushwood weir existed the salmon could pass through it, but after the stone wear was substituted, they could not do so, except occasionally at high flood. Lord Ellenborough, C. J. said: "The erection of wears across rivers was reprobated in the earliest periods of our law, and were considered as public nuisances. Magna Charta and subsequent acts so treated them, and forbade the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. I remember that the stills erected in the river Eden by the late Lord Lansdale, and the Corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced in this Court to be illegal and a public nuisance. Though twenty years' aquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing." Judgment was therefore given for the defendant.

[1] *Weld v. Hornby*, 7 East. 195.

In an Irish case[1] the point was raised directly. The Marquis of Donegal, who was seised of the sole and several fishery in Loughneagh and the river Bann, brought an action against Lady Hamilton, who was a lower proprietor on the Bann, for keeping divers cuts, wears, and traps across the river, by means of which the trout, salmon, and other fish which would have come from the sea, were prevented from coming into the plaintiff's fishery. Both parties held under grants from the Crown, the grant to the plaintiff being the prior grant. The question was elaborately argued several times in the Irish Courts, and ultimately before the Irish House of Lords, and judgment was given for the plaintiff.[2]

[1] *Hamilton* v. *M. of Donegal*, 3 Ridg. P. C. 267.

[2] Fitzgibbon, L. C. in an elaborate judgment, says: "Here it is to be considered what are the respective rights of the proprietors of these fisheries, and what is the injury which the plaintiff complains of as done to his rights. And as to the first, it is clear that the plaintiff, as proprietor of the upper fishery, has a right to the full possession of the water, the element of his fishery, in the same state, plight, and condition in which he enjoyed it at the time when the corporation under whom the defendant derives, obtained their grant from the Crown. He has a right to a free passage for fish from the sea into his fishery; and he has a right to catch as many fish as he can catch, by his industry and art which find their way into his fishery. It is clear that the defendant has the same rights as proprietress of the lower fishery. She has a right to the same full possession of the water to a free passage for fish from the sea into her fishery; and she has a right abstractedly to catch every fish which finds its way into her fishery, which she can lay hold of by her art or by her industry. But in the exercise of this right she cannot alter the state, plight, or condition of the water of the plaintiff's fishery from the state, plight, and condition in which he enjoyed it at the time when the corporation, under whom she derives, obtained their grant, to the injury of the plaintiff's fishery. Nor can she stop or obstruct the passage of fish from the sea into the plaintiff's fishery in any manner not essentially necessary to enable her to exercise her right of catching fish in their passage up the river.

Another illegal obstruction to fisheries was the practice of attaching nets to the posts on river banks, by day and night, across rivers, which destroyed the brood and fry of fish. An ancient statute,[1] so far back as 1423, prohibited this practice; but that statute has been repealed by the Salmon Fisheries Act, 1861, though the restriction is renewed by sect. 11 of the latter Act. The practice, therefore, so far as other fish than salmon are concerned, rests in the common law, and it seems to be illegal at common law on the same ground as wears are. It must be borne in mind also that wherever there is a peculiar protection to salmon, all fish of the same or larger size have the benefit of it indirectly.

Wears and Fixed Nets illegal at Common Law.—In no case, either in England, Ireland, or Scotland, has the point been distinctly raised, whether the erecting of a wear or other fixed apparatus in a river, and which is

This, then, being in my judgment a fair statement of the rights of the parties, plaintiff and defendant, it remains only to be considered what the injury is of which the plaintiff complains as the ground of this action. The injury stated is, that by means of four cuts, wears, and traps, kept and maintained upon the rocks in the defendant's fishery, divers large quantities of salmon and trout and other fish, which otherwise would, during the time aforesaid, have come from the sea and that part of the river Bann which lies below the plaintiff's fishery, into it, were obstructed and hindered from coming into it, by reason whereof the plaintiff's fishery is prejudiced and damaged and lessened in value. The verdict finds that the fish were obstructed and the rapidity of the current in each of the openings between the cuts or traps was such as to prevent, obstruct, and hinder as many fish from going from the sea into the plaintiff's fishery as formerly. If the obstructions alter the course of the element, I have no hesitation in saying that that would maintain an action." See also *Duke of Devonshire* v. *Smith*, Alc. & Nap. 442.

[1] 2 Hen. VI. c. 15.

not objectionable as obstructing the navigation, but which obstructs the fish from passing upwards, is a ground of action at common law to a riparian owner further up the stream. In Scotland, as will be seen, the common law has long been merged in the ancient statutes which govern the subject. The nearest case is the Irish case already referred to,[1] where a lower proprietor was held to have a good cause of action against a lower proprietor for constructing a wear which had the effect of obstructing the fish. But in that case the jury found, as a fact, which was relied on by the Lord Chancellor, that the wear altered the current of the water so as to prevent the passage of the fish. Probably all wears must, in the same sense, necessarily alter the current of the water, and therefore an action would be sustainable. But on the other ground also, namely, that of obstruction of the fish, a wear seems on principle to be a good cause of action to other riparian owners. So far as salmon are concerned, the question is now practically provided for by the Salmon Fisheries Act; but as regards other fish, and where the Salmon Act does not apply, the question may still arise, and therefore is of some importance, seeing that there may be wears which do not substantially alter the current of the river, and in that respect stand on the same footing as fixed nets.

That both wears and fixed nets, and all other apparatus which prevent fish passing to and fro, are illegal at common law, and form a good ground of action, seems to follow on principle. A fishery is merely one of the

[1] *Hamilton* v. *M of Donegal*, 3 Ridg. P. C. 267.

natural uses of the water to which all riparian owners are entitled. Other uses of water are the use of it to water cattle, to drive a mill, for household purposes, &c.; and it seems to be a principle of the common law that is entitled to a moderate and not an excessive user. If any one riparian owner abstract the water to such an extent that he substantially alters the plight and volume, thereby injuring riparian owners further down the stream, it is well established that he is liable to an action at the suit of the latter. That is a case of excessive user, which can only injure those towards whom the current flows, and not those from whom it has already flowed, and who had previously had their use of the water. But a fishery is in its nature enjoyable when the fish have free passage. The right of a riparian owner may be injured by the acts of other riparian owners, both above and below him, but more frequently by those beneath him, seeing that fish are in some way connected with and come from the sea. If, therefore, one riparian owner fix a net or erect a wear which entirely obstructs the fish, he necessarily deprives the upper riparian owners from deriving from the water one of the uses to which they are entitled. Though one riparian owner may, by fishing by net or rod at al lhours, and by means of servants and assistants, may almost use up the fish as effectually as by keeping fixed nets, this kind of user could not properly be a cause of action any more than one owner who has a large number of cattle would be liable to an action as against another who has no cattle, and so takes no use of the water. But it is otherwise where a total obstruction occurs. Hence, even

independently of any statute, any fixed apparatus in a river or stream which prevents the fish going up to the other riparian owners, is a good cause of action at common law, as it deprives him of one of the natural riparian rights.

Sale of Fish.—Many ancient statutes were passed for the purpose of protecting the markets for fish against foreigners. Now all fish imported into Great Britain and Ireland are free from Customs' duty.[1]

Billingsgate is a free and open market for the wholesale and retail sale of all sorts of fish.[2] It is regulated chiefly by a local Act, which recites many public Acts which were passed with reference to it, and it is now only subject, like other markets, to local bye-laws. Formerly a toll of 2*s.* per cargo was levied on fishing boats passing the Nore, but that is now abolished.[3]

[1] 18 & 19 Vict. c. 101.
[2] 9 & 10 Vict. cccxlvi.
[3] 22 & 23 Vict. c. 69.

CHAP. IV.

DIFFERENT KINDS OF FISHERIES IN POINT OF LAW.

CONFUSION AS TO TERMS—STATE OF THE AUTHORITIES AS TO DEFINITIONS—DEFINITION OF SEVERAL FISHERY—MODE OF USER OF FISHERY—FREE FISHERY—DISTINCTION BETWEEN FREE AND SEVERAL FISHERY—COMMON OF FISHERY—DIFFERENT KINDS OF COMMON OF FISHERY—ASSIGNABILITY OF RIGHT OF FISHERY—NOT AN EASEMENT—WHETHER FISHERY PASSES AS APPURTENANT TO LAND—FISHERY MAY BE SUBDIVIDED—GRANT OF FISHERY, WHAT KIND IS MEANT—WHETHER GRANT OF FISHERY CARRIES SOIL—RESULT OF AUTHORITIES—FISHERY GRANTED BY STATUTE—LEASE OF FISHERY—ORDINARY LEASE OF LANDS WITH WATER—FISHERY IN STREAMS OF A MANOR—RATEABILITY OF FISHERY.

Confusion as to Terms.—In the sea and navigable rivers the soil is in general vested in the Crown, and the public has merely a right of fishery there, or an individual may have the exclusive right of fishing in certain localities. In such a case it is not very material to consider the nature of the right.

But in private streams and waters it is necessary to distinguish between the different kinds of right which may exist as regards the fishery, several phrases being current in the books and reports, such as a common fishery, a free fishery, a several fishery, a fishery in gross, and a common of fishery. These phrases are not

very clearly defined and distinguished from each other. Judges, commentators, and reporters, indeed, differ so essentially, that no human intelligence can perhaps now reconcile them.

State of the Authorities as to Definition of Terms.—The chief difficulty consists in precisely distinguishing the phrases a free fishery and a several fishery. The other phrases seem capable of a fixed meaning.

Coke says,[1] "A man may prescribe to have *separalem piscariam* in such a water, and the owner shall not fish there, but if he claim to have *communiam piscariæ* or *liberam piscariam*, the owner of the soil shall fish there; all this has been resolved." Again,[2] "If one be seised of a river, and he grant a several fishery in the same and make livery of seisure *secundum formam chartæ*, the *soil* does not pass, nor the water, for the grantor may take water there, and if the river become dry he may take the benefit of the soil, because a particular right only passed to the grantee, and the livery being *secundum formam chartæ*, cannot enlarge the grant. And if a man grant *aquam suam*, the soil shall not pass, but the piscary within the water shall."[3]

[1] Co. Litt. 122 a.

[2] Co. Litt. 4 b.

[3] Hale (De Jur. Mar. c. 1.) "One man may have the river, and others the soil adjacent, or one man may have the river and soil thereof, and another the free or several fishing in that river."

Again: "Fishery may be of two kinds ordinarily, viz. the fishing with the net, which may be either as a liberty without the soil, or as a liberty by reason of and concomitance with the soil or interest or propriety of it; or, otherwise, it is a local fishing that ariseth by or from the propriety of the soil; such are gurgites, weares, fishing-places,

Hargrave, in a note to Co. Litt. 122*a*, comments on the contrast between Coke and Blackstone's descriptions

brachiæ, strachiæ, &c. which are the very soil itself, and so frequently agreed in our books."—Harg. Ir. 18.

In the Yearbook, 17Ed.IV. 6 pl. 5. Brian, C. J. says: "There is a great difference between a several and a free fishery, for no man can have a several fishery unless it be in his own soil, but I may grant a free fishery to twenty persons in my own pool.

Holt, C. J. observes (*Smith* v. *Kemp*, 2 Salk. 637): "There are three sorts of fisheries: 1. Several fishery; and there, he who had the fishery was owner of the soil, and therefore it is a good plea in an action brought by him that it is *liberum tenementum*. 2. Free fishery, which is where the right of fishing is granted to the grantee, and such grantee hath a property in the fish, and may bring a possessory action for them without making any title. 3. Common piscary; and this was to be resembled to the case of other common, and he disallowed the authority of 1 Inst. 122." Again (*Gibbs* v. *Wolliscot*, 3 Salk. 291), Holt, C. J. says: "A man may have a free fishery in his own soil, as, for instance, he may have a river in his manor, and another may have a right of fishing there with him."

Lord Mansfield, C. J. says (*Seymour* v. *Courtenay*, 5 Burr. 216): "This could not be a free fishery because no one possessed a co-extensive right with the plaintiff, and there could be no pretence for calling it a common of piscary. Consequently it was a several fishery." "To constitute a several fishery it is requisite that the party claiming it should so far have the right of fishing, independent of all others, as that no person should have a co-extensive right with him in the subject claimed."—*Ibid.*

Blackstone (2 Bl. Com. 39) says: "A free fishery or exclusive right of fishing in a public river is also a royal franchise. This differs from a several fishery, because he that has a several fishery must also be [or at least derive his right from] * the owner of the soil, which, in a free fishery is not requisite. It differs also from a common of piscary before mentioned, in that the free fishery is an exclusive right, the common of piscary is not so; and, therefore, in a free fishery, a man has a property in the fish before they are caught, in a common of piscary, not till afterwards. Some, indeed, have considered a free fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the several fishery of the grantor. But to consider such right as originally a flower of the prerogative till restrained by

* These words within brackets were not in the earlier editions.

of the terms used, and says that "according to Coke, ownership of the soil is not necessarily included in a several fishery, and that common of fishery and free fishery are the same thing." And in referring to cases which seem to favour the opposite view, he says, "At the utmost the cases cited only prove that a several piscary is presumed to comprehend the soil till the contrary appears, which is perfectly consistent with Coke's position that they may be in different persons, and indeed appears to us the true doctrine on the subject. As to a free fishery, though for the sake of distinction it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers by derivation from the Crown, and though in other countries it may be so considered, yet from the language of our books it seems as if our law practice had extended this kind of fishery to all streams, whether private or public, neither the register nor other books professing any discrimination." In a recent case the doctrine of Coke seems to have been adopted as regards a several fishery. An elaborate discussion on the subject of what is meant by a "several fishery" was entertained in a late case, by the Court of Exchequer Chamber,

Magna Charta, and derived by royal grant previous to the reign of Richard I. to such as now claim it by prescription, and to distinguish it as we have done from a several and a common of fishery may remove some difficulties in respect to this matter with which our books are embarrassed; for it must be acknowledged that the rights and distinctions of the three species of fishery very are much confounded in our law books, and that there are not wanting respectable authorities which maintain that a several fishery may exist distinct from the property of the soil, and that a free fishery implies no exclusive right, but is synonymous with common of piscary."

and it was held that a several fishery was *primâ facie* to be assumed to be in the soil of the owner of the fishery, but it might be in the soil of another, and to an action of trespass for fishing therein, *liberum tenementum* was a good plea, to which the plaintiff must reply by showing a grant of a several fishery, or a prescriptive right to one.[1] In *Kinnersley* v. *Orpe*, Doug. 56, the question was raised, but not decided, whether a person who had the exclusive right of fishery, but without the soil, could declare on a several fishery. The last and most recent case,[2] follows up the doctrine that *primâ facie* the conveyance of a several fishery carries with it the soil.

Definition of Several Fishery.—It thus appears that, according to the authorities, it is difficult to give any precise meaning to the two kinds of fishery called several and free fishery. It will therefore be necessary to look at the nature of the right itself, in order to arrive at that definition which is most consistent with the soundest authorities. A several fishery is the largest right of fishery known to the law. Whoever is the owner of the soil beneath a river not navigable, is also entitled to the exclusive fishery in the superincumbent water, and for want of a more definite name this is called his several fishery; and *primâ facie* the owner of a several fishery is the owner of the soil also, for the former right is originally an incident of the latter.[3]

[1] *Holford* v. *Bailey*, 13 Q. B. 426, 8 Q. B. 1016.
[2] *Marshall* v. *Ulleswater*, Co. 8 L. T. N. S. 416.
[3] *D. of Somerset* v. *Fogwell*, 5 B. & C. 875; *Holford* v. *Bailey*, 13 Q. B. 444; *Marshall* v. *Ulleswater Steam Co.* 8 L. T. N. S. 416.

But the owner of the soil and fishery may grant the several fishery to another by deed without passing the soil, though it will be a question of construction, if there is any ambiguity attending a particular case, whether the soil did not also pass, or at least such use of the soil as is necessary for the use of the fishery.

The result of the best authorities, and of a sound consideration of the nature of the subject-matter, seems to be this: A several fishery is the exclusive right of fishing in a certain place. It belongs *primâ facie* to the owner of the soil beneath, as an incident of such ownership of the soil. Though strictly speaking this use of the superincumbent water is included in the ownership of the soil, yet it may be separated from that ownership and conveyed by deed to a third party, who is a stranger to the soil. In the sea and navigable rivers a several fishery does not result from ownership of the soil, which is in the Crown, but from ancient grant of the Crown, as far back as Magna Charta, or, from what implies a grant, by prescriptive user. In private rivers and streams a several fishery is one of the riparian rights.

Mode and Uses of Fishery.—The owner of a several fishery is *primâ facie* entitled to catch as many fish as his ingenuity or industry admit, provided he has the whole stream; but inasmuch as the right of a private fishery, in the event of other owners being entitled to parts of the same stream, is to some extent held in common, and an immoderate user by any one will prejudice the rights of the others, he is at common law, as we have already stated, bound to exercise his right

in the usual way, and so as not to injure or annihilate the rights of his neighbours. Hence, though as far as his right to the soil goes, he would be entitled to erect a wear or similar contrivance adjoining his own lands, yet if it has the effect of stopping all the fish, or sensibly preventing them from passing upwards to the upper proprietors, he will be liable to an action on the case.[1] And so, if he kept a net constantly fixed across the stream, having a similar consequence, this would also be a ground of action. But if he confines himself to net or rod fishing, in the way usual among fishermen, there is no limit to the extent to which he may catch the fish by this means. If the owner and his servants be constantly at work with rods and nets, they may by mere industry destroy as many fish in the course of a few months as ought to be destroyed by a wear or fixed net in a shorter time, and thus the two kinds of user are only in one sense degrees of the same thing; yet the exercise of the right in the former manner is held to be legitimate, and its excess is no ground of action, whereas the latter is not so, notwithstanding the result to the other parties is identical, or nearly so.[2]

As regards salmon, the Salmon Fishery Act contains various provisions on the subject of fixed nets and wears, which are to be treated of in a separate chapter.

Free Fishery.—The term free fishery, as has been seen in dealing with a several fishery, is used so loosely in

[1] *Hamilton* v. *Marquis of Donegal*, 3 Ridg. P. C. 267; *Weld* v. *Hornby*, 7 East. 195.

[2] *Hamilton* v. *Marquis of Donegal*, 3 Ridg. P. C. 267.

the authorities, that no definite meaning can be attributed to it. Lord Mansfield said it was a right of fishery which was co-extensive with the rights of others.[1] Coke seems to favour the same definition, for he says: "If a man prescribe to have *separatem piscariam* in a water, the owner shall not fish there; but if a man claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soil shall fish there."[2] So in the Yearbook, Brian, C. J. says: "There is a great difference between a several and a free fishery, for no man can have a several fishery unless it be in his own soil; but I may grant a free fishery to twenty persons in my own pool."[3] Holt, C. J. gives two definitions, the latter is this: "A man may have a free fishery in his own soil, and another may have a right of fishing there with him."[4] Blackstone admits[5] that the books are embarrassed with difficulties on this subject,[6] and defines it as an exclusive right of fishing in a public river, and that a man has a property in the fish there before they are caught. But Hargreave observes,[7] that both parts of the definition are open to dispute.

There being, therefore, little precision in the authorities, it is necessary to revert to first principles. We have seen that where *A* has the soil, and has not parted with the right of fishery in the superincumbent

[1] *Seymour* v. *Courtenay*, 5 Burr. 2814.
[2] Co. Litt. 122 a.
[3] 17 Ed. IV. 6 pl. 5.
[4] *Gipps* v. *Woolcott*, 3 Salk. 291; see another account, *Smith* v. *Kemp*, 2 Salk. 637.
[5] 2 Bl. Com. 3, 9.
[6] See *ante*, p. .
[7] Note to Co. Litt. 122 a.

water, which is a right appurtenant to the soil, he has a several fishery in such water, except where it is a navigable river or the sea, and where *primâ facie* the whole public may fish. But if *A* grant to *B*, a stranger, the right of fishing along with *A*, then *A* and *B* will have each a free fishery there. *A* may grant such a right to several persons in like manner, each of whom will have a free fishery. Such a grant can only be made by deed, and it will depend on the words of the grant whether and how far *A*, after making a grant to *B*, can afterwards make a similar grant to *C*, *D*, and others, seeing that the more persons there are who share in such a right the less valuable does it become. It is probably owing to this incident that a free fishery is not often met with. It closely resembles a common of fishery, and the chief distinction between them seems in reality to be in their origin, the free fishery being generally traceable to a specific deed or grant, and the common of fishery being the growth of time and immemorial user, which imply a grant.

Distinction between Free and Several Fishery.—The chief distinction between a free fishery and a several fishery is, that two or more persons concurrently and jointly hold the former, whereas the latter is exercised by one person exclusively. A free fishery, unlike a several fishery, implies no ownership of the soil. It is, however, an incorporeal hereditament, and can only be conveyed by deed.[1] The remedies for its obstruction and invasion will be stated afterwards.[2]

The above distinction between the terms free and

[1] See *ante*, p. . [2] See chapter VI.

several fishery is recognised in the opinion of the judges in a recent case,[1] where Willes, J. observes: "Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleadings, following Blackstone, a 'free' instead of a 'several' fishery. This is more of the confusion which the ambiguous use of the word 'free' has occasioned from as early as the Year book, 7 H. 7 P. fo. 13, down to the case of *Holford* v. *Bailey*, 13 Q. B. 444, where it was clearly shown that the only substantial distinction is between an exclusive right of fishery, usually called several, sometimes free (used in 'free warren'), and a right in common with others, usually called 'common of fishery,' sometimes 'free' (used as in free port). The fishery in this case is sufficiently described as a several fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil." For the reason already stated, the retention of the words several or exclusive fishery, and free or common of fishery, is advisable, and in that sense those words are uniformly used in this work.

Common of Fishery.—A common of fishery is the right of fishing in waters which belong to the lord of the manor, and is on the same footing as other commons. A common is a right which is almost invariably associated with existing manors, and is traceable to the customs which originally governed those manors, the practice having been for the lord to allow each of the tenants of the manor to pasture cattle or cut turf on the

[1] *Malcolmson* v. *O'Dea*, 9 H. L. Cas.

wastes, or to fish in the river or lake of the manor, the right being appendant or appurtenant to the copyhold estate, and in some rare cases being severed therefrom and associated with the person or in gross. It is a very inconvenient right, for it is seldom capable of being easily apportioned and expanded with altered circumstances. The fishery of the manor must necessarily be a fixed quantity; and if the lord were constantly carrying out new plots of ground, and letting it to copyhold tenants, each being allowed to fish in the lord's water, the fishery must necessarily in time become diminished, and ultimately exhausted, for each fresh addition of a tenant is *pro tanto* a diminution of the rights of the previously existing tenants. Thus if a manor happen to be situated in a place which suddenly becomes populous, and the land is taken up for building purposes, the new tenants would *ipso facto* be entitled to the right of fishery, if they were made tenants of the manor in the usual way, for the custom would extend to them, in which case the previous tenants would have an action against the lord for surcharging the fishery, if they found their right of fishery prejudiced. Hence the lord's power to increase indefinitely the copyhold tenants must necessarily be limited, so as not to diminish the equal rights of the previously existing tenants. If the river or lake is large enough to satisfy the reasonable requirements of all the tenants, ancient and new, there is no harm done, but otherwise if the right of the ancient tenants is practically prejudiced by the fishery being overworked or surcharged. At the same time, in estimating the inconveniences of such rights as

the common of piscary, it is also to be recollected that the extent of user of the commonable right is always qualified by custom, and is restricted to certain periods of the year, and to the usual modes of fishing; and moreover, except in the case of commons in gross, the quantity of fish which can be lawfully taken is co-extensive with the reasonable requirements of the household. Therefore, taking all these considerations together, it is obvious that the right of common of piscary is one which in itself is necessarily limited in its nature, and exists almost exclusively by the ancient custom of manors, and is seldom created by modern deeds. It is, however, competent to grant a right of free fishery by deed, which nearly resembles a common of piscary.[1]

Different kinds of Common of Piscary.—A common of piscary is of three kinds: common appendant, common appurtenant, and common in gross. A common appendant is a right inseparably annexed to the possession of a particular house, and the extent of the right is measured by the reasonable requirements of the family. It is a right of a permanent nature attached to a house, and is not available to mere inhabitants or lodgers, but is restricted to him who has an estate or interest in the house.[2] Hence it is that the inhabitants of a vill or city cannot prescribe for such a right, as there would be an uncertain measure of claimants.[3]

A common of piscary appurtenant is a right claimed

[1] See *Hargrave* v. *L. Congleton*, 12 Ir. C. L. 362, as to an analogous case of common of turbary.

[2] Gateward's case, 6 Rep. 59 a.

[3] *Ordeway* v. *Orme*, 1 Bulst. 183; *Tinnery* v. *Fisher*, 2 Bulst. 87; *English* v. *Burnell*, 2 Wils. 258.

by a person in respect of a house not necessarily connected, by way of tenure or otherwise, with the locality of the fishery. The right must have been granted by deed within the time of legal memory.[1] It may also be severed from the house and land to which it is appurtenant.[2]

Common in gross is a right claimed by a person, not in respect of any land, but under a grant or, what is equivalent, by prescriptive user.[3]

Nature of Right, and its Assignability.—The nature of a right of fishery proper is an incorporeal hereditament, and as such can be conveyed only by deed.[4] A licence of fishing is distinct from the right of fishery, and is at most only a justification for what would otherwise be a trespass. A licence is revocable at will, and in order to be binding, even for an hour, must be granted by deed.[5]

Fishery not an Easement.—The right to a fishery is classed among profits *à prendre*, and not among easements;[6] and a several fishery in a navigable river may pass as appurtenant to a manor.[7]

Whether Fishery will Pass as Appurtenant to Land.—Much discussion arose in an Irish case, whether a fishery could be claimed by prescription, as appurtenant

[1] *Coulam* v. *Slack*, 15 East. 108; *Pretty* v. *Butler*, 2 Sid. 87.

[2] *Leniel* v. *Harlop*, 3 Keb. 66; *Hayes* v. *Bridges*, 1 R. L. & S. 390.

[3] Co. Litt. 122 a; 2 Inst. 477; 4 Rep. 38.

[4] *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875; *Bird* v. *Higgenson*, 2 D. & E. 696.

[5] Per Parke, B. in *Holford* v. *Bailey*, 13 Q. B. 426; *Hopkins* v. *Robinson*, 2 Lev. 2.

[6] *Bland* v. *Lipscombe*, 4 E. & B. 713 n; *Wickham* v. *Hawker*, 7 M. & W. 63

[7] *Rogers* v. *Allen*, 1 Camp. 311.

to land, and it was held[1] that it could. On this subject Finucane, J. thus lucidly expounded this matter:—"The question is, whether an exclusive right of fishing for oysters can be prescribed for as appurtenant to land, and whether it can be prescribed for as appurtenant to anything but that on which it is to be used. To constitute an appurtenance, nothing is necessary but that the principal and the adjunct should not be *ejusdem generis*, and that they be capable of union without repugnance or inconsistency. One corporeal hereditament cannot be appurtenant to another corporeal hereditament, because they pass by the same solemnities, and there is no reason why one should be the principal more than the other; but incorporeal inheritances of every kind may be appurtenant to corporeal, and corporeal to incorporeal ones, provided there be no inconsistency. Whether they be capable of being so united, must depend on their several natures, and the terms of the grant by which they are, or are supposed to be created, for appurtenance is founded on grant, or on prescription, which supposes a grant. . . . In fact, the true test of congruity between the principal and the adjunct is not the advantage which either may derive from the other, but the propriety of the relation between them, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity. This is Hargrave's opinion;[2] so it is laid down in 2 Mod. 144, a rent or any profit *à prendre* may be appurtenant to a manor. Now what advantage can

[1] *Hayes* v. *Bridges*, 1 R. L. & S. 390.
[2] Co. Litt. 126 b, *in notis*.

a manor as a manor derive from such a rent? None. The same reasoning will apply to a fishery. If it is a common of fishery that is claimed, it may be well confined to taking for private use, because otherwise the other commonors may be deprived of the benefit of their common. It may be therefore argued that such a fishery could be claimed only as appurtenant to a house, but there can be no reason for confining it to a house where the exclusive right is claimed, because the fishery much exceeded the quantity necessary for the consumption of the house. So that a fishery may be claimed as appurtenant to any corporeal inheritance as well as a house."

Fishery may be Sub-divided.—A right of fishery is capable of sub-division into parts, and the party entitled to the complete right may let part of it, reserving the rest to himself, just as a tenant of lands may let the game, which implies the right of entry to shoot. Thus an oystery may be let out of a general fishery.[1] And so he who has a general fishery may let the rod and line fishing only; and if possession has been had, he can recover the rent under an *indelitatus* count for use and occupation, though there has been no grant by deed.[2]

In Grant of a Fishery, what kind is meant.—Where a person having a several fishery grants to another his fishery, without specifying what kind of fishery, the whole several fishery will pass, because the grant will be taken most strongly against the grantor. A case in

[1] *Seymour* v. *Courtenay*, 5 Burr. 2814; *Rogers* v. *Allen*, 1 Camp. 309.
[2] *Holford* v. *Pritchard*, 3 Exch. 793; *Bird* v. *Higgenson*, 2 A. & E. 696.

1657[1] clearly shows this, where it was said: "It was resolved that if one who has a several fishery grant a free fishery, the grantee has a free fishery along with the grantor, but if he grant his fishery without saying more, the entire piscary will pass."[2]

In one case the plaintiff had granted to the defendant the mill, with all waters, streams, &c. necessary for working the mill, and usually held and enjoyed therewith, except and always reserved to the said Lord Paget, his heirs, &c. the right and privilege of fishing in the waters of the said mill. At the time of the grant Lord Paget had a sole fishery in these waters. The Court held that if there were words in the English language which will not admit of doubt, they are these. Lord Paget had water for a mill, and he had a sole fishery, and he grants the mill, with the water for the mill, reserving the fishery, and the question is, whether the whole right of fishing is reserved, or whether a new right is created by it." The Court held the whole fishing was reserved.[3]

Whether Grant of Fishery carries the Soil.—Where a lease or deed specifies merely the fishery or the fishings, without other terms, it is a question of construction whether the soil passes along with the fishery; and it seems *primâ facie* that the soil does not pass.[4] There are, however, conflicting authorities,[5] or rather there is

[1] *Alderman de Londres* v. *Hasting*, 2 Sid. 8.
[2] See also Co. Litt, 4 b, 122 a; *ante*, p.
[3] *Lord Paget* v. *Milles*, 3 Doug. 43.
Co. Litt. 4 b.
[5] Plowd. 154 a; *Smith* v. *Kemp*, 2 Salk. 637; *Holford* v. *Bailey*, 13 Q. B. 444; 8 Q. B. 1016.

a looseness of language on this subject corresponding to the looseness of meaning attached to the word several fishery. Bayley, J. says it may be true that the owner of a several fishery must be presumed to be the owner of the soil, where the terms of the grant under which he claims are unknown; but when they appear, and are such as convey an incorporeal hereditament only, the presumption is destroyed.[1] And in a previous case he said: "I should doubt very much if the grant of a fishery would convey the soil and everything underneath it, such as all the minerals, though I can conceive that it may pass so much of the soil as is connected with the fishery."[2] Another reason why the word fishery should not be held to carry the soil, is this: inasmuch as it is settled that a fishery is capable of being split into a fishery for oysters, for floating fish, for salmon, &c. it would follow, if it be construed to draw the soil, that by such grants it may be conveyed to as many persons as there are different kinds of fish.[3]

The point whether the soil passed with the grant of a fishery, has hitherto chiefly been raised in questions on the construction of ancient deeds taken in connexion with the subsequent user.

The mode of construing and ascertaining the nature of the right of fishery were thus stated by Bayley, J.: "In order to form a judgment whether this was a grant of a mere incorporeal hereditament or not, we must look at the terms of the grant, and in what manner the

[1] *D. of Somerset* v. *Fogwell*, 5 B. & C. 875.
[2] *R.* v. *Ellis*, 1 M. & S. 665.
[3] Per Finucane, J. in *Hayes* v. *Bridges*, 1 Ridg. L. & S. 420.

grantee has from time to time exercised the thing granted. Now it appears that he has exercised, not merely the right of fishing, but of landing his nets on the beach, or any part of the bed of the river, wherever he thought fit; and he also has been used to drive stakes into the ground for the purpose of affixing his net to them. There is, however, no privilege granted by the deed to use the beach or bed of the river for any such purpose; there is none at least granted in express terms. But it is said it would pass as incident to the grant; and if it were necessary to the exercise it might and would pass as incident; but to say that is begging the question, because it is assuming that it is necessary; but of that the sessions were the proper judges.[1] There are many instances of these rights of fishery being exercised without landing nets on the beach or bed of the river, or driving piles into the ground, such as the fisheries in the Thames, the Southampton and other rivers, which are carried on by means of boats alone for that purpose. Therefore it is not a necessary incident to such a right as this that the party should have the privilege of landing nets on the beach or of driving stakes. If, then, this be not an incidental privilege, nor one which is granted in express terms, to what else can the exercise be referred except to its being a grant of a fishery of such a nature as conveyed at least the surface of the soil.[2]

A deed which conveyed "a messuage, tenement, boathouse, &c. and all the sea grounds, oyster-layings, shores

[1] The case in hand was an appeal against a finding of justices.
[2] Per Bayley, *R.* v. *Ellis*, 1 M. & S. 666-7.

and fisheries," was held to convey the right of soil in the sea-shore between high and low-water mark, and not merely the oyster fishings.[1]

In another case, a deed granted "all that our fishery of the halves and halvendoles, with the fishings called Unlawater, with the appurtenants to the halves due and accustomed, within the river Severn, with all royal fishes there to be taken." The Court held this passed the soil, because whatever "the halves and halvendoles" precisely meant, they distinctly appeared to be of the nature of land, and the words "royal fish" also implied that the ownership of the soil went with it. At all events, the Court held there was sufficient doubt to prevent them disturbing the order of sessions, which rated the fishery as including land.[2] In like manner where, under an agreement, a tenant held the fishery of the pond containing sixty acres, called Alresford pond, with the grates, &c. and also all the spearsedge, flags and rushes growing in and about the said pond,

[1] *Scriveon* v. *Brown*, 4 B. & C. 845. "It seems to me," said Bailey, J. "the word sea-ground alone would have passed the soil, but then the words 'oyster layings' are introduced, and it is said that from those words it is to be inferred that, by the words 'sea grounds,' it was intended to convey a privilege of laying oysters only. I think, however, that these additional words may have been introduced because the grantor was uncertain as to the nature of the right which he had actually derived from the crown." Holroyd, J. also observed that, in a grant it was not very material which of the parts stands first. And Littledale, J. said that the words "oyster layings" would not of itself have passed the soil, but coupled with the word "shores," it would.

[2] *R.* v. *Ellis*, 1 M. & S. 652. Le Blanc, J. in that case relied on the expression, "halves and halvendoles" being explained by the useage tha of fishermen under it, for they used nets which lay on the beach or bed of the river, and sometimes they affixed one end of the net to a pole stuck into she bed of the river.

and the right of cutting the sedge growing on land adjacent, &c. it was held that he was rateable to the poor, and that it might be taken that the fishery and the soil passed together.

In the case of the fishery of the Banne,[2] it appeared that the king had the fishery of the Banne, a navigable river, as parcel of the ancient inheritance of the Crown, and James I. by letters patent granted to Sir R. McDonnell, in fee, the territory of Roul, parcel of the Co. Antrim, and adjoining to the river Banne, in that part where the fishery was; and by the letters patent the king granted "omnia castra, messuagia, &c. piscarius piscationes aquas aquarum cursus," &c.; and it was held that the fishery of the Banne did not pass by the grant of the land adjoining and by the general grant of all piscaries, for that it was a royal fishery, not appurtenant to the land, but a fishery in gross, and was by itself part of the inheritance of the Crown, and that general words in a grant by the king would not pass such a special royalty, which belonged to the Crown by prerogative.[3]

The most recent case on this subject was where the plaintiff brought an action of trespass against the

[1] Buller, J. said: "The fact of letting a fishery is sufficient, and we must presume that the soil passed along with it." And Ashurst, J. said: "There is no doubt that a fishery is a tenement, and that trespass will lie for an injury to it, and it may be recovered in ejectment." This last observation is, of course, loosely expressed, for everything depends on what is meant by "fishery." The case only proves that, where the words are somewhat uncertain, and the sessions find the fact that the soil passed, the Court above will not reverse that finding without very clear words of grant.—*R.* v. *Alresford*, 1 T. R. 358.

[2] Davis 55.

[3] *D. of Somerset* v. *Fogwell*, 5 B. & C. 875.

defendant for breaking his several fishery in Ullswater lake. In proof of his title, the plaintiff produced a deed of feoffment, dated 1741, conveying to his predecessor a fishery in the *locus in quo*, on payment of a yearly rent of 4*d.* to the lord of the manor. On this deed of feoffment livery of seisin was duly made. The Court held that the fishery must be taken to mean a several fishery, and so presumably included the soil thereof. The Court held that construction confirmed by the fact that a feoffment with livery of seisin indorsed would not be appropriate to the conveyance of an incorporeal right, although it might if the livery was *secundum formam chartæ* so operate; moreover, a free rent of 4*d.* was incapable of being reserved out of an incorporeal inheritance by a common person.

Result of Authorities.—Though it may now be taken as concluded by the above authorities that a grant of a several fishery, if nothing is known as to the ownership of the soil, will impliedly carry the soil, yet the result seems to be opposed to sound principle.[1]

[1] That point was strongly put in the above case of *Marshall* v. *Ullswater Co.* by Cockburn, C. J. "It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the river. Why, then, should such a fishery be considered, in the absence of negative proof, as carrying with it the property in the soil? On the contrary, it seems to me that there is every reason for holding the opposite way. The use of water for the purpose of fishing is, when the fishing is united with the ownership of the soil, a right incidental and accessory to such ownership. In a grant of the land, the water and the incidental and accessory right of fishery would necessarily pass with it. If, then, the intention be to convey the soil, why not convey the land at once, leaving the accessory to follow? Why grant the accessory, that the principal may follow incidentally? Surely such a proceeding would be at once illogical and unlawyer-like. The greater is justly said to comprehend the less;

Fishery granted by Statute.—Sometimes the right of fishery is entirely the creature of agreement between the parties, and must depend on the construction of the deed. Thus, where a canal Act provided that the owners of the lands on which a reservoir was made might let all the water out once in seven years, for the purpose of taking the fish therein, and the act also said that all the owners of lands through which the canal was made should have the right of fishery in so much of the canal as should be made over their lands respectively, it was held that the meaning was not that all the owners should have a tenancy in common in the fish caught on emptying the reservoir, but that each should take whatever fish might be left on his own soil, each having a several fishery on his own land.[1]

So in a case where a canal was made through a manor, it was enacted by the local statute that "the lord of the manor should have the right of fishery of and in so much of the canal, cut, and reservoir as shall be made in, over, or through the common or waste lands

but this is to make the converse of that proposition hold good. A grant of land carries with it, as we all know, the minerals which may be below the surface. But who ever heard of a grant of the minerals carrying with it the general ownership of the soil? Why should a different principle be applied to a grant of that which is above the surface of the soil, as the grant of the minerals is a grant of that which is below it? Nor should it be forgotten that the opposite doctrine involves the startling and manifest absurdity that, should the water become dry, or be diverted from natural causes, the fishery, which was the primary and principal object of the grant, would be gone, and the property in the soil, which only passed incidentally and as accessory to the grant of the fishery, would remain." To the above illustrations may be added the analagous case of the game of an estate, a grant of which does not carry the soil.

[1] *Snape* v. *Dobbs*, 8 Moore 23.

within the manor, and the owner of any other lands should have the like right of fishery in so much of the canal or collateral cut as shall be made in, over, or through his lands." It was held that the words "commons or wastes" meant those commonable lands of which the soil was in the lord, and not open fields, where owners have rights of severalty; and that the lord had a right of fishing only in the canal or cut over his lands and not in the reservoir.[1]

Lease of Fishery.—A several fishery may be let to a tenant at a fixed rent, in the same manner as the shootings or game. Both are incorporeal hereditaments, and can only be granted by deed. Nor can a valid and irrevocable licence to fish be granted, even for an hour, except by deed.[2] But the fishery may be let by verbal agreement; and even where no rent has been agreed upon, the landlord is entitled to sue the tenant for a reasonable rent under an *indebitatus* count for use and occupation.[3]

Ordinary Lease of Lands including Water.—In the ordinary case of a lease of lands including waters or streams, the right of fishery is necessarily implied as part of the general right to the soil and water, unless the lessor specially reserve it. If, therefore, there is no special reservation of the right of fishery, the tenant and not the landlord will be the party entitled to the fishery. Properly speaking, the right cannot be reserved by the lease; but, what is practically the same thing,

[1] *Grand Union Canal Co.* v. *Ashby*, 6 H. & N. 394.

[2] Per Parke, B. in *Holford* v. *Bailey*, 13 Q. B. 426; *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875.

[3] *Holford* v. *Pritchard*, 3 Exch. 793.

the reservation is construed as a regrant by the tenant to the landlord.[1] Indeed, a reservation is equal to a grant.[2] The reason why a tenant of lands has the right of fishery in the waters or streams of the farm is, that the lease gives the exclusive possession of the banks, and of the riparian rights attaching to them, and fishery is one of these rights, and the lessor could not, without express power being reserved, come on the lands to exercise the rights of fishery.

Fishery in a Manor.—With regard to a river, stream, or water within a manor, there is no presumption that the several or free fishery therein belongs to the lord of the manor; on the contrary, the presumption is in favour of the owners of the adjacent land.[3]

Ratability of Fishery.—A mere fishery proper, that is, an incorporeal hereditament, is not ratable to the poor under 43 Eliz. But if the fishery is coupled with the right to the soil, as it may be under a grant generally of the fishery, accompanied by proof of use of the soil for nets and stakes, then it is liable to the poor-rate in respect of the profits attaching to it.[4] Bayley, J. however, doubted whether a grant of a fishery would convey the soil, and everything beneath it, such as the minerals, though he conceived that it might pass so much of the soil as is connected with the fishery.[5] Whether the mere grant of a fishery carries with it a

[1] See *Graham* v. *Ewart*, 7 H. L. Cas. 231; Paterson's Game Laws, &c. p. 16.

[2] Per L. Mansfield, *Seymour* v. *Courtney*, 5 Burr. 2817.

[3] *Lamb* v. *Newbiggin*, 1 C. & K. 549.

[4] *R.* v. *Ellis*, 1 M. & S. 652. See also, *Bute* v. *Grindall*, 1 T. R. 338.

[5] *R.* v. *Ellis*, 1 M. & S. 666.

right to the soil as incidental thereto, which it would do if the right to the soil were necessary to the exercise of the right of fishery, yet it is a question of circumstances whether the fishery can be carried on without the use of the soil.[1] And though the fishery itself may not be ratable, the tithe of fish is ratable on the lands of the lay impropriator.[2] No tithe is due for fish of common right but it may be by custom.[3]

[1] *R.* v. *Ellis*, 1 M. & S. 666.
[2] *R.* v. *Carlyon*, 3 T. R. 385.
[3] Anon. 6 Mod. 223; Cro. Car. 264, 339; 1 Lev. 179; 1 Sid. 278; 1 Vent. 5; 5 Bac. Ab. 63; 5 Com. Dig. 'Dismes.'

CHAP. V.

RIGHT OF PROPERTY IN FISH, AND LARCENY AND COGNATE OFFENCES AS TO FISH.

RIGHT OF PROPERTY IN FISH—HOW FAR LARCENY MAY BE COMMITTED AS TO FISH—STATUTORY OFFENCE OF POACHING FISH BY 24 & 25 VICT. C. 96, § 24—EFFECT OF ENACTMENT—WATERS NOT ADJOINING DWELLING HOUSES—ARRESTING FISH-POACHERS—SEIZING FISH-POACHERS' IMPLEMENTS—MODE OF PROSECUTING POACHERS—RIGHT OF PROPERTY IN POACHED FISH—MALICIOUS INJURIES TO FISHERIES—DESTROYING FISH PONDS—POISONING OF WATERS—STEALING OYSTERS—OYSTERS GENERALLY.

Right of Property in Fish.—The nature of the property in fish caught in a several fishery depends on the size and nature of the water. If the water is a pond enclosed in the owner's grounds, in which the fish can be caught more or less at pleasure, the property in such fish is vested in the owner of the fishery, and they are more like chattels, or are in the category of reclaimed beasts kept in confinement.[1] Accordingly, if a person take such fish he is liable to an action of trespass, or in certain cases is guilty of larceny.

Where the water is large and the fish therein are

[1] Grey's case, Owen, 20.

feræ naturæ (for the question is one chiefly of degree), there is also an offence in the nature of larceny committed in certain cases under 24 & 25 Vic. c. 96, § 24; but cases not within the common law definition of larceny, nor within that Act, are regulated by common law.

Fish in a Trunk or Pond.—It is obvious that fish in a trunk, net, or small enclosed space where they can be taken at the will of the owner, are subjects of property; they are wild animals reduced into possession, or kept in confinement. Accordingly larceny at common law may be committed as to these, seeing that they are fit for food, and so it has frequently been held.[1] But as to a pond or small lake, where fish are kept, the question will depend upon the size of such pond. According as the pond is small or large the owner can only take them with less or more difficulty, it being a question mostly of time, and cases may be supposed where there is really no substantial distinction between fish in a pond and fish in the sea or a river as regards their natural liberty. If the test of its being a subject of larceny is, that the pond is enclosed in private property, then larceny may equally be committed of fish in a lake of several miles extent, because the fish cannot get away in one sense, and if the test be the facility of catching the fish, it is obvious that, as between a pond or lake and a river there is very little difference in this respect, it being indeed a question of time in all cases, except, perhaps, where they are in a trunk or very small pond, when they can be taken at will.

How far Larceny may be Committed.—It is obvious

[1] Grey's case, Owen, 20.

some such line must be drawn in order to decide whether or not the fish are capable of larceny.[1] In all the authorities it will be found the word pond is not defined, whereas the whole question must obviously turn on the size of it. The distinction is therefore very loosely drawn, and while on the one hand all the authorities seem to agree that fish in a trunk may be subjects of larceny, no one attempts to define how large the pond or lake must be where larceny ends.[2]

[1] East (Pl. Co. 610) observes: "It has been doubted whether, at common law, larceny can be committed of fish in a pond. It is admitted that it may be if they be confined in a trunk or net, because they are then restrained of their natural liberty. And it seems difficult not to extend the application of the same reason to the case of fish in a pond, the pond being private enclosed property, and the fish liable to be taken at any time, according to the pleasure of the owner. Lambert (274) says: 'Fishes in streams and rivers are *nullius bona, et occupanti conceduntur;* but he and others agree that it may be felony to take them in a trunk, stew, or pond, for a man hath such a possession of them that, by their restraint they cannot, without help, use their nature and forsake him.' So Lord Coke says larceny may be committed of fish in a trunk or pond, because they are not at their natural liberty, but, as it were, in a pound. Hawkins (c. 33, b. 25), considers it clear that the taking of fish out of a pond is felony."

[2] Thus Hale (1 Hale P. C. 510-11) says: "Larceny cannot be committed of things that are *feræ naturæ*, unreclaimed; and *nullius in bonis*, as of deer or conies, though in a park or warren; fish in a river or pond; wild fowl, wild swans, pheasants. But of young pigeons in a dove cot, fish in a trunk or net, larceny may be committed." Various other authorities leave undefined the distinction as to what is the size of pond in which larceny of fish may be committed." See 49 H. 6, M. p. 14, pl. 9, 10; 18 Ed. IV. fol. 8, pl. 7; Lamb. 269; Cromp. 33 b; Pult. 131; Dalt. 349, 350; 1 Hale, 510; Grey's case, Owen, 20; *Child* v. *Greenhill*, Cro. Car. 553; *Mallocke* v. *Eastly*, 3 Lev. 227; *Upton* v. *Daukin*, 3 Mod. 97; *R.* v. *Steer*, 6 Mod. 183; 1 Hawk. c. 33, § 25, 26, 27.

In *R.* v. *Hunsdon*, East. P. C. 611, which was an indictment under a statute 5 Geo. III. c. 14, for entering a garden and stealing from a pond, it was the opinion of some of the judges that, if the indictment had been at common law for felony, it should have described what sort

Statutory Offences of Poaching Fish.—Seeing that the offence of taking fish in a several fishery amounts at common law to larceny only in those cases where the place is a trunk or very small pond, the size of which is indefinite, though there must obviously be a limit somewhere, it was necessary that a statute should enact penalties so as to protect the fisheries in places where larceny could not be committed. Accordingly the Larceny Act, 24 & 25 Vict. c. 96, § 24, contained such an enactment.[1]

of a pond it was, that it might appear on the face of the indictment that taking fish out of such a pond was felony.

[1] "Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour.

And whosoever shall unlawfully take or destroy, or attempt to take or destroy, any fish in any water not being such as herein before-mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a Justice of the Peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding £5, as to the Justice shall seem meet.

Provided, that nothing hereinbefore shall extend to any person angling between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset: but whosoever shall, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully and wilfully take or destroy, or attempt to take or destroy any fish in any such water as first mentioned, shall, on conviction before a Justice of the Peace, forfeit and pay any sum not exceeding £5; if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding £2, as to the Justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of such water, as it is in this section before-mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto."—24 & 25 Vict. c. 96, § 24.

Effect of Enactment.—The effect of the enactment 24 & 25 Vic. c. 96, § 24 is to alter the common law in some cases, where otherwise larceny would have been capable of being committed, and to reduce the offence from larceny to a misdemeanour. Thus, where the fish have been taken and destroyed in a pond adjoining to and belonging to a dwelling-house, if the pond was small, larceny, as already stated—that is, felony—would be committed; but now, whether the pond be small or large, and even though it is not a pond but part of a stream, if it fulfil the description of a water adjoining the dwelling-house, the offence committed is a misdemeanour.

Place of Offence.—In order to commit this offence the water must belong to or adjoin the dwelling-house of the person who is owner of the water or the owner of a fishery therein. "To adjoin" in this sense must mean a moderate contiguity in point of local distance and without intervening fences,[1] and "to belong to" seems to imply that the water is held or let with the house under the same tenure or lease, or at least that both the house and the fishery belong to the same owner, though it seems they need not be both occupied by the same person. If the water is a pond in the private grounds attached to the house, there can be no difficulty in holding the offence committed there, even though the distance be more or less according to the size and style of the house. But where the water is a running stream, which must necessarily extend to a great distance, as no test is given whereby to determine where the line is to be drawn at which the stream ceases to adjoin or

[1] *R.* v. *Hodges*, M. & M. 341.

belong to the house, the safer course will be to resort to the next clause of the same section, which declares the offence in respect of "water not being such as hereinbefore mentioned." This, which is an offence punishable by fine of 5*l.* and the value of the fish, may be committed in all waters which do not adjoin or belong to any dwelling-house, provided such water is private property or in which there is a private right of fishery. In short, this description seems applicable to all streams which are not navigable rivers, and whatever be the description of fish taken. The words also include even navigable rivers and the sea, wherever an individual has a several fishery at the spot in question, as may well be the case.[1]

Form of Conviction.—The conviction must be drawn up with reasonable certainty as regards the place and the circumstances of the offence.[2]

Form of Indictment.—An indictment for fishing by

[1] Where a conviction for fishing without consent of the owner stated the *locus* to be "in part of a certain stream which runneth between *B* in the parish of *A* in the county of *W*, and *C* in the same parish and county," it was quashed because it did not appear, and the Court would not assume that the intermediate course of the stream between the two termini where the offence was alleged to have been committed, was in the county of *W*, and within the jurisdiction of the convicting magistrate. *R.* v. *Edwards*, 1 East. 278. The conviction ought to state that the defendant had not the licence or consent of the owner of the fishery. *R.* v. *Mallinson*, 2 Burr. 679; 2 Ld. Ken. 384; *R.* v. *Daman*, 2 B. & Ald. 378; *R.* v. *Corden*, 4 Burr. 2279.

The warrant of commitment must show all that is material to constitute the offence, though the conviction may have been quite regular; and though the same precision in the warrant of commitment is not necessary, still enough must be stated to show an authority to imprison. *Wickes* v. *Clutterbuck*, 2 Bing. 483.

[2] See *supra*.

force of arms without licence, and unlawfully, unless there was a riotous assembling for the purpose, is not sustainable at common law, as already stated, and it requires a statute to make it good.[1]

Whether Manual Possession of Fish is necessary to the Offence.—The first offence, viz. that of misdemeanour, consists in taking or destroying; and it is to be observed, that something short of catching the fish alive or dead will amount to the offence of "taking." There need not be manual possession acquired;[2] but the means used are wholly immaterial. No mere attempting to catch the fish will amount to that offence; at the same time, if they are caught either by hand, by rod, or net, or in any other manner, the offence will be complete. The only qualification as to means is as regards angling during certain hours specified; and all that is then done is to reduce the offence of angling during those hours from misdemeanour to a penal offence. Mere taking of fish for scientific purposes, or, it seems, even for purposes of removal to other waters, was not a criminal offence under the older Acts.[3]

Poaching Fish not near a Dwelling-house.—As re-

[1] *R.* v. *Marshall*, 2 Keb. 594. In an indictment under 24 & 25 Vict. c. 96, § 24, for stealing or taking fish, it is not necessary to allege the number of fish taken. *R.* v. *Wetwang*, 1 Lev. 203, nor that they were the goods and chattels of the owner. *R.* v. *Hunsdon*, 2 East. P. C. 611. *R.* v. *Steer*, 6 Mod, 188. Indeed, unless they are in a stewpond or trunk, they are not goods and chattels, though, if they are in a close pond, they might be called *pisces sui.* *R.* v. *Steer*, 3 Salk. 189, 291.

The indictment should state that the place was water in land adjoining or belonging to the dwelling-house. *Wickes* v. *Clutterbuck*, 2 Bing. 483; 10 Moore, 63; *R.* v. *Sadler*, 2 Chitt. 519.

[2] *R.* v. *Glover*, R. & R. 269.

[3] *Bridger* v. *Richardson*, 2 M. & S. 568.

gards the second offence specified in 24 & 25 Vict. c. 96, § 24, viz. that of taking fish in waters other than those adjoining a dwelling-house, it is to be observed that the offence consists not only in actually taking or destroying, but attempting to do so. In order to prove this offence, therefore, circumstantial evidence will in general be sufficient. Thus, in the analogous case of pursuing game, the Justice may infer the offence was committed from evidence that the person was seen going about a field with a dog and gun, and acting like one looking for game.[1] So, if a man is seen near a river or stream, in the attitude of fishing, this will be some evidence of the offence, though weak evidence.

Several Offences on One Day.—There can only be one offence committed on one day, though there may be several takings, or attempts to take fish on the same day, for the penalty is not affixed to the number of fish taken, or of the times attempted.[2]

Who may Prosecute for Poaching Fish.—Any person may prosecute for poaching fish under this enactment, for the penalty is not declared to be forfeited to the owner of the fishery or water, and there are no equivalent words. In the older statutes it was otherwise.[3]

Arresting Fish Poachers.—The Larceny Act gives express power to any person to arrest fish poachers, if caught in the act.[4] The arrest may be made without a

[1] Paterson's Game L. 5; *R.* v. *Scott*, 8 L. T. N. S. 662.

[2] *R.* v. *Levett*, 7 T. R. 152.

[3] *R.* v. *Daman*, 2 B. and Ald. 378; *R.* v. *Corden*, 4 Burr. 2279; and see Paterson's Game L. 55, as to the analogous cases under the Game Acts.

[4] By the 24 & 25 Vict. c. 96, § 103, any person found committing any

warrant, except only as regards angling-poachers by day. Though only the owner of the ground or fishery, and no other person, can, under the 25th section,[1] demand and seize the fishing implements, any person whatever, though a stranger, has power to arrest the poacher himself, under the 103d section. But the poacher can only be so arrested when found committing the offence; that is, he must be found on the spot—or near it—where he has been actually poaching. If, therefore, the poacher has left the place, and got to the highway or into another field, the power to arrest can no longer be exercised. The party arresting has no right to seize and keep the fishing implements, unless he is also the party authorized to do so by the 25th section.[2] Nor can the party arresting seize and take possession of the fish poached, for these belong to the poacher, unless in the case (which must be very rare) where they were taken out of a small pond or trunk, as to which larceny would be capable of being committed at common law.[3] The words in the section "together with such property" obviously

offence punishable either upon indictment or upon summary conviction by virtue of this Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person and forthwith taken, together with such property (if any), before some neighbouring Justice of the Peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a Justice of the Peace a reasonable cause to suspect that any person has in his possession or on his premises, any property whatsoever, on, or with respect to which any offence punishable either upon indictment, or upon summary conviction by virtue of this act shall have been committed, the Justice may grant a warrant to search for such property, as in the case of stolen goods.

[1] See *post*, p. 79.

[2] See *post*, p. 79.

[3] See *ante*, p. 72.

do not apply to poached fish, for these were not "property" before they were caught, and when caught they belong to the poacher, and therefore a search warrant cannot be obtained to get at poached fish. Those words refer to the ordinary case of goods stolen provided for in previous parts of the Larceny Act. When arrested, the poacher must be taken within a reasonable time before a neighbouring Justice. The arresting party may hand over the poacher to police constables, and detain, or leave him in charge at the nearest police station, or any other convenient place, under the charge of others, while he goes in search of a Justice of the Peace.[1] Some statutes fix a maximum time, such as twelve hours, for taking the arrested party to a Justice; but as no time is here mentioned, it is enough that there is no more delay than is reasonable in the circumstances.

Seizing Fish-Poacher's Implements.—The statute 24 & 25 Vict. c. 96, § 25, gives power to seize the poacher's fishing implements.[2] The power to seize these implements is in derogation of the common law, and therefore

[1] *Evans* v. *Machloughlin*, 4 L. T. N.S. 31; 4 Macq. Ap. C.

[2] If any person shall at any time be found fishing against the provisions of this Act, the owner of the ground, water, or fishery, where such offender shall be so found, his servant, or any person authorized by him, may demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish which shall then be in his possession, and, in case such offender shall not immediately deliver up the same, may seize and take the same from him, for the use of such owner. Provided, that any person angling against the provisions of this Act, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken, or by whom the same shall be so delivered up, shall, by the taking or delivering thereof, be exempted from the payment of any damages or penalty for such angling."—24 & 25 Vict. c. 96, § 25.

must be strictly construed. At common law, the owner could neither arrest a trespasser, nor seize his fishing implements. This section gives no power to arrest the poacher, but it is given by sect. 103.[1] In exercising the special power given by this section to seize the implements, it will therefore be necessary to observe the qualifications under which it is given. The persons entitled are the owner of the ground, water, or fishery, and his servants; and therefore if, as may well be, the ground or fishery is let, the occupier would not be entitled, for there is no definition of the word owner which includes occupier. The demand must be made on the spot where the poaching takes place, and therefore if the poacher has left the water and the ground, he is beyond the reach of seizure. The demand must first be made in a reasonable manner before the seizure can be made by force;[2] and no more force is to be used than what is necessary. When seized, the fishing implements belong absolutely to the owner of the ground or water who seizes them, and who can thereupon do what he likes with them. The seizure of the implements is a remedy over and above the misdemeanour or penalty incurred by the illegal fishery; but as regards anglers during the hours specified, if the rod, &c. are seized, no other remedy can be resorted to.

In exercising the statutory power of arresting poachers, it may well happen that the servants of the owner of the fishery may assault and imprison the trespasser at a place which, though near, is not within the limits of

[1] *Ante*, p. 77.
[2] *Wisdom* v. *Hodson*, 3 Tyr. 811.

their master's fishery. Thus, for example, the gamekeepers of Colonel Pennant took into custody a man fishing at night in the Menai Straits, near the mouth of the river Ogwen. An action having been afterwards brought for the false imprisonment and assault, the question was, whether the defendants were entitled to notice of action; the jury having found that the spot where the arrest took place was a few yards beyond the limits of the fishery, but that the defendants *bonâ fide* and reasonably believed that the fishery extended to that spot, the Court held that the defendants were entitled to notice of action in such circumstances. This decision does not show that no action will lie, but merely that if an action is brought, the usual notice of action (one month's notice) must be first given, so that the defendants may have an opportunity of tendering amends for the wrong they had inadvertently done.[1]

Abettors of Fish Poaching.—Though persons who abet fish poaching are not liable to be apprehended, still they may be proceeded against by summons before a justice; and they are liable to precisely the same punishment as the poachers themselves.[2]

Mode of Prosecuting Poachers.—If the poacher has not been apprehended in the act of poaching, and so taken at once red-handed before a Justice, the only mode of proceeding against him is by laying an information before a Justice at petty sessions where the offence was committed. A summons will then be issued, calling upon the party to appear at a day to be named, when

[1] *Hughes* v. *Buckland*, 15 M. & W. 346.
[2] 24 & 25 Vict. c. 96, § 99.

the prosecutor must be in attendance with his witnesses to give evidence; and if the defendant do not appear, a warrant will then be issued for his apprehension.[1]

[1] 24 & 25 Vict. c. 96, § 105; 11 & 12 Vict. c. 43.

[2] The details of the procedure before the Justices are as follows: By 24 & 25 Vict. c. 96, § 120, the procedure is to be under Jervis's Act, 11 & 12 Vict. 43.

Procedure before Justices.—It sometimes happens that a person prosecuted for poaching asserts that he had a legal right so to fish. There is no express provision in this statute by which a defendant who *bonâ fide* claims to fish where he has fished under such supposition of right, is entitled to oust the jurisdiction of the Justices. No express provision, however, was necessary; for in all cases determinable before Justices, it is competent to a defendant to set up this claim. Thus, if he *bonâ fide* claims a title to the fishery, the Justices, if satisfied of the *bona fides*, ought to stay their hands, and leave the matter to be settled by an action at law. Per Crompton, J. *R.* v. *Cridland*, 7 E. & B. 853; *Jones* v. *Taylor*, 1 E. & E. 21; *Legg* v. *Pardoe*, 30 L. J. 108 M. C.; *Leatt* v. *Vine*, 30 L. J. 207 M. C. The Justices must, however, be satisfied of the *bona fides*, and hence must have some reasonable evidence of the ground of the claim, for they are not to be stayed by every idle assertion of a defendant in such cases. *Williams* v. *Adams*, 30 L. J. 109 M. C. The claim must be also set up by the defendant in his own right. *Cornwell* v. *Sanders*, 26 J. P. 757.

The penalties are to be paid to the party aggrieved, 24 & 25 Vict. c. 96, § 106, which means to the owner or occupier of the fishery, and if he is not known, then to the clerk of the petty sessional division, 11 & 12 Vict. c. 43, § 31. The defendant may be committed for non-payment of the penalty, 24 & 25 Vict. c. 96, § 107. The form of commitment for non-payment of a penalty is given in 11 & 12 Vict. c. 43, sched. Q 1. The Justice may, if it is a first offence, discharge the defendant on his making satisfaction to the party aggrieved for damages and costs, 24 & 25 Vict. c. 96, § 108. If the party has paid the penalty, or it has been remitted by the Crown, this is a bar to all other proceedings for the same cause, 24 & 25 Vict. c. 96, § 109.—The defendant's release from other proceedings mentioned in this section, however, only takes effect where the party suing is the same party who had instituted the proceedings for a summary conviction as informer. *Tarry* v. *Newman*, 15 M. & W. 654. If the penalty exceeds £5 or the imprisonment exceeds one month, or the conviction took place before one Justice only, the party may appeal to the next quarter sessions, 24 & 25 Vict. c. 96, § 110. And if either party choose (and

Officers of the Army and Navy Poaching Fish.—The Annual Mutiny Act contains an enactment that every

in case of conviction, whatever may have been the amount of penalty inflicted) he may demand a case to be stated to one of the superior courts under 20 & 21 Vict. c. 43. The conviction shall not be removed by *certiorari*, 24 & 25 Vict. c. 96, § 111. This section, however, only applies where there is jurisdiction in the Justices, and does not prevent a *certiorari* where there is no jurisdiction, *Evans* v. *Macloughlan*, 4 L. T. N.S. 31. And it only precludes the defendant, and not the prosecutor, from applying for a *certiorari*, for the statute does not bind the Crown, which acts through the prosecutor, *R.* v. *Boultbee*. 4 A. & E. 505. So the section does not apply where the Justices are interested, *R.* v. *Cheltenham Com.* 1 Q. B. 467; *R.* v. *Justices of Hertfordshire*, 6 Q. B. 753, unless the defendant waived the objection, Ibid; *R.* v. *Rishton*, 1 Q. B. 479; *R.* v. *Justices of Richmond*, 24 J. P. 422. The conviction must be transmitted by the committing Justice to the next quarter sessions, 24 & 25 Vict. c. 96, § 112.

Another similar enactment is contained in 11 & 12 Vict. c. 43, § 14, which is only a directory provision, *Charter* v. *Graeme*, 13 Q. B. 216. If the Justices unduly delay drawing up the conviction they are liable in an action of damages, *Proser* v. *Hyde*, 1 T. R. 414; *R.* v. *Medlam*, 3 Burr. 1720; *R.* v. *Eaton*, 2 T. R. 285. A *mandamus* does not lie to the Justice's clerk to transmit the conviction, for it is the duty of the Justices themselves, *Ex.* p. *Hayward*, 27 J. P. 102.

Where an action is brought against a person for anything done in pursuance of the Act, the venue shall be laid in the county of the offence; one month's notice may be given, &c. 24 & 25 Vict. c. 96, § 113. In order to determine when a thing is done in pursuance of the Act, it is essential that the party act *bonâ fide* in the belief that some statute protected him in enforcing the law, though he may not know precisely which statute. And it is not essential that he act reasonably, for *bona fides* may exist without reasonableness of conduct: *Hermann* v. *Seneschal*, 12 C. B. N.S.; 26 J. P. 598; *Read* v. *Coker*, 13 C. B. 850: *Booth* v. *Clive*, 10 C. B. 834; *Hughes* v. *Buckland*, 15 M. & W. 346. And it is a question for the jury whether the party acted *bonâ fide* in the circumstances, Ibid; *Haseldine* v. *Grove*, 3 Q. B 997; *Cox* v. *Reid*, 13 Q. B. 558; *Braham* v. *Watkins*, 16 M. & W. 77; *Horn* v. *Thornborough*, 3 Exch. 846. The notice of action should state clearly and explicitly the time and place of the alleged illegal act, so as to show it was illegal: 11 & 12 Vict. c. 44, § 9; *Martins* v. *Upcher*, 3 Q. B. 662; *Breese* v. *Jerdain*, 4 Q. B. 585; *Jones* v. *Nichols*, 13 M. & W. 361; *Jacklin* v. *Fitche*, 14 M. & W. 381. The main facts

officer who shall without leave in writing from the persons entitled to grant such leave, take, kill, or destroy any

should be stated, but the subordinate facts need not be so, *Leary* v. *Patrick*, 15 Q. B. 266. The notice should also state in what court the action is to be brought, as well as the plaintiff's name and place of abode, and those of his attorney (if any), 11 & 12 Vict. c. 44, § 9. If the action is against a Justice, the notice should also state the cause of action, that the Justice may know whether the alleged illegal act was one done by him as a Justice, or in excess of jurisdiction, as pointed out by 11 & 12 Vict. c. 44, §§ 1, 2; *Taylor* v. *Nesfield*, 3 E. & B. 724. If the Justice acted not as a Justice, or if the defendant was not a Justice in fact, no notice is necessary, *James* v. *Saunders*, 10 Bing. 429; *Lester* v. *Barrow*, 9 A. & E. 654. The notice of action may be given before the quashing of the conviction, though the action cannot be brought till after it, *Haylock* v. *Sparke*, 1 E. & B. 471. If the act done was within the jurisdiction of the Justice, then the declaration must allege malice, and want of reasonable and probable cause, 11 & 12 Vict. c. 44, § 1. And in that case the conviction need not be set aside before the action is brought. But if the act was done without, or in excess of jurisdiction, the declaration need not allege malice, yet the conviction must be quashed before action brought, 11 & 12 Vict. c. 44, § 2. If the Justice has doubts about his acting he may refuse to act until compelled by the Court of Queen's Bench, in which case he will be protected from an action, 11 & 12 Vict. c. 44, § 6. Where a conviction and warrant of conviction were drawn up with blanks for costs at the time of the imprisonment, this being a mere irregularity, no action will lie unless malice is alleged, *Botts* v. *Ackroyd*, 28 L. J. 207 M. C. The action must be brought in the superior Court, at least if the defendant insist, 11 & 12 Vict. c. 44, § 10. If the plea of not guilty by statute is pleaded, the particular statute must be stated in the margin, Rule Pl. T. T. 1853. Full costs mean taxed costs, 5 & 6 Vict. c. 97, § 2.

Offences committed within the jurisdiction of the English Admiralty are to be punished as if they were committed in the place where the offender is apprehended or in custody, 24 & 25 Vict. c. 96, § 115. In offences punishable summarily, the shore between high and low water mark is within the ordinary jurisdiction of the county Justices, *Embleton* v. *Brown*, 30 L. J. 136 Q. B.; 25 J. P. 38. In indictments for a subsequent offence, it is enough to allege generally a previous conviction at a certain time and place, and which is provable by certificate, 24 & 25 Vict. c. 96, § 116. When the offender is convicted of an indictable misdemeanour, he may be fined, and ordered to find

game or fish in the United Kingdom of Great Britain and Ireland, shall for every such offence forfeit the sum of 5*l.*[1]

The Marine Mutiny Act contains an enactment precisely the same.

Right of Property in Poached Fish.—In those cases where fish in a fishery are not protected by the before-mentioned statutory enactments, the only reliance must be on the common law. As already stated, it is only where the fish are in a trunk or small pond that the taking of them can amount to larceny. In other cases, the highest offence a trespasser can commit is a misdemeanour, if he take the fish in a pond or private fishery adjoining a dwelling-house, and an offence punishable by summary conviction and fine in fisheries not adjoining a dwelling-house. In all the cases except where a larceny is committed, the poacher or trespasser is at common law entitled to keep the fish he catches, for the property in them vests in him by virtue of the general rule that he who first catches a wild animal is entitled to the property thereof, even though such animal is caught by trespassing on another's ground, and by committing an offence. This rule, which was laid down by the Roman law, has been adopted by the law of England, and neither the Larceny Act, nor any other Act, alters it. The statute does not enact that the fish so caught shall belong to the owner

sureties to keep the peace, 24 & 25 Vict. c. 96, § 117. Hard labour may be added as a punishment for any indictable offence, 24 & 25 Vict. c. 96, § 118. The Court may allow the costs of the prosecution for any indictable misdemeanour under the Act, as in cases of felony, 24 & 25 Vict. c. 96, § 121.

[1] The mode of procedure is under Jervis's Act, 11 & 12 Vict. c. 43, which, for this purpose, is made applicable to Scotland as well as Ireland.

of the fishery or of the soil; all it does is to empower the owner of the fishery and his servants not so much as to seize the fish if found in his possession, but only to seize and confiscate the fishing implements used by the poacher, if the poacher can be found on the fishery,[1] and to arrest him in certain circumstances.[2] With regard to game, the same general rule applies, except that there is a qualification to this extent, that if a poacher or trespasser start and kill, or catch game on one and the same person's lands, then the property in such game vests in the owner of the land,—a doctrine laid down by Holt, C. J. in *Sutton* v. *Moody*, 1 L. Raym. 250.[3] There is no trace of any such qualification as the doctrine of *ratione soli* having ever been recognised with reference to wild fish, and therefore the rule seems to remain unqualified at common law, that the poacher who catches fish even on another's private fishery (except where the offence is larceny) is the owner of such fish. He may incur penalties, or even commit a misdemeanour in catching them, but when caught, the property in the fish so caught is his own, and the owner of the fishery or the soil cannot by action or any other remedy recover the fish. Moreover, it is to be observed, that there is no power given by any statute relating to fish, to seize the poached fish from a poacher, as there is in relation to game in certain circumstances.[4]

The above doctrine as to fish generally applies to salmon, for the Salmon Fishery Act does not by any

[1] 24 & 25 Vict. c. 96, § 25; *ante*, p. 79.

[2] 24 & 25 Vict. c. 96, § 103; *ante*, p. 77.

[3] Paterson's Game Laws, p. 17; also Christian's Game Laws on this point.

[4] Ibid, p. 64.

general clause enact that the poacher shall not be entitled to the fish he catches by his illegal trespasses. The statute is mainly directed against the lawful owners of the fisheries catching the fish by means which are declared illegal, and does not generally affect poachers. Nevertheless, in a few specified offences under that Act, the poacher, as well as the owner of the fishery, using certain illegal means there specified, is declared to forfeit the fish so caught.[1]

Malicious Injuries to Fisheries.—Fisheries, as already stated, are to a great extent protected by the Larceny Act against invasion by poachers; they are also protected by the Malicious Injuries Act, 24 & 25 Vict. c. 97, § 32, from wilful injuries.[2] This enactment creates

[1] Such as using dams—not ancient fishing dams—for catching salmon, 24 & 25 Vict. c. 109, § 12; catching in the head-race or tail-race of a mill, *ibid;* catching unclean salmon, § 14; or young salmon, § 15; catching salmon in annual close time, § 17; or weekly close time, § 21; but as to the last case, anglers are excepted. See the Act in Appendix.

[2] "Whosoever shall unlawfully and maliciously cut through, break down, and otherwise destroy the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime, or other noxious material, in any such pond or water, with intent thereby to destroy any of the fish that may then be, or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam or floodgate of any millpond, reservoir, or pool, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."—24 & 25 Vict. c. 97, § 32.

three offences: 1. The destroying a fishpond with intent to take the fish. 2. Putting lime or other noxious material in the water with intent to destroy the fish. 3. The destroying a dam or floodgate. The last offence has no immediate bearing on a fishery, and need not be specially noticed.

Destroying Fishpond.—The offence of destroying a fishpond consists in maliciously cutting through the dam, &c. of a water where there is a private fishery, but the intent, or at least the consequence, must be the loss or destruction of the fish. The older statute of 9 Geo. I. c. 22, now repealed, was held to apply to wanton mischief, but not to cases where the cutting was used as a means of catching the fish;[1] but now the latter case is expressly included. There is no necessity that the water be a pond kept for breeding the fish, though the former Act of 5 Geo. III. c. 14, § 1, was so restricted.[2] Nor need the water be fenced off and enclosed, as was necessary under 5 Geo. III. c. 14, § 3.[3]

The mischief done must be such as is reasonably calculated to cause the loss or destruction of the fish. It is not, however, necessary that any of the fish should have been actually destroyed, if either the intent existed, or the means used was reasonably calculated to destroy the fish.[4]

Poisoning of Waters.—The poisoning of waters in which there is a private right of fishery, with lime and similar

[1] *R.* v. *Ross*, R. & R. 10.
[2] *R.* v. *Carradine*, R. & R. 205.
[3] *Lisle* v. *Brown*, 1 Marsh. 127.
[4] *R.* v. *Bradford*, 24 J. P. 374; 8 Cox, c. c. 309.

matter, with intent to destroy the fish, is declared to be a misdemeanour. The word "material" mentioned in this enactment, seems comprehensive enough to include everything, *ejusdem generis*, with lime put into waters with malicious intent, and which has a tendency to kill fish. The malicious intent is to be inferred from the conduct of the parties, and the circumstances, though no malice against the particular owner of the fishery need be proved.[1] Abettors in such an offence are punishable like the principal offenders.[2] No intent to injure a particular person need be alleged in the indictment.[3] Whenever a person is found committing the offence, he may be immediately apprehended without warrant by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring Justice of the Peace, to be dealt with according to law.[4] The provisions as to procedure under this enactment are identical with those under the Larceny Act.[5]

There is a special enactment in the Salmon Fishery Act, protecting salmon waters.[6]

Other Enactments against Fouling Water.—Besides the specific enactments above stated, for the protection of fisheries, there are some other enactments, which, though not primarily intended for the benefit of fisheries, may sometimes be brought in aid of them. Thus, the Waterworks' Clauses Act[7] imposes a penalty of 5*l.* and

[1] § 58. [2] § 56. [3] § 60. [4] § 61.
[5] *Ante*, p. 82.
[6] See *post*, Ch. VIII.
[7] 10 Vict. c. 17, § 61.

20*l.* a day upon all who throw rubbish into, or otherwise foul a stream, reservoir, or aqueduct belonging to a water company; and gas manufacturers who cause or suffer to flow into such waters their gas washings, forfeit 200*l.* and 20*l.* per day.[1] So putting filth or rubbish into waters under the management of a local board of health, is punishable with a penalty of 5*l.* and 20*s.* per day.[2] So gas manufacturers who foul "any aqueduct, pond, or place for water," incur a penalty of 200*l.* and 20*l.* per day, which must be sued for within six months after the offence.[3]

Stealing Oysters.—In order to protect oysters from poachers, the Larceny Consolidation Act contains a special enactment.[4]

[1] 10 Vict. c. 17, § 62, 63.

[2] 11 & 12 Vict. c. 63, § 80.

[3] 18 & 19 Vict. c. 121, §§ 23, 24.

[4] "Whosoever shall steal any oysters or brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof, shall be liable to be punished as in the case of simple larceny.

"And whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement.

"And it shall be sufficient in any indictment to describe, either by name or otherwise, the bed, laying, or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill.

"Provided that nothing in the section contained shall prevent any

Oyster Spawn.—By the ancient statutes 13 Rich. II. st. 1, c. 19, and 17 Rich. II. c. 9, the spawn or brood of oysters were protected from destruction. At first it was contended that oysters were not fish within the meaning of those Acts, but were rather part of the soil to which they adhered.[1] But those statutes have been repealed entirely by the Salmon Fishery Act, 24 & 25 Vict. c. 109, and now there is no restriction on the taking of oyster spawn by the party who is entitled to fish for the oysters.

Separation of Oysters from Floating Fish.—Whoever has a right to fish in a particular water, has a right to take all kinds of fish without distinction. It is a common practice to let the oyster fishery separately from the right to take the floating fish, in which case each fisherman must use due care not to injure the other's rights.[2] Oysters differ chiefly from other fish in the characteristic that they adhere more or less to the soil, and they were not comprehended within the description of "sea-fish" in the older statutes, that expression being *primâ facie* interpreted to mean floating fish.[3] With regard to such shell-fish as are found on the shore, there is no general right of the public to take these, any more than there is a right to take sand or sea-weed, for both are part of the soil;[4] though as regards

person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only."—24 & 25 Vict. c. 96, § 26.

[1] *Mayor of Maldon* v. *Woolvet*, 12 A. & E. 13.

[2] *Seymour* v. *L. Courtenay*, 5 Burr. 2814; *Rogers* v. *Allen*, 1 Camp. 309.

[3] *Bridger* v. *Richardson*, 2 M. & S. 568.

[4] *Bagot* v. *Orr*, 2 B. & P. 472.

sand, a custom may be established by the inhabitants of a particular vill, or parish, to take or dig sand to repair highways, to ballast ships, &c.[1]

Oysters in reality are cultivated like a trade, and may be classed either with chattels, or wild animals tamed, and hence the penalty for stealing property when visibly marked out and appropriated, is severe. Nevertheless, there must be proved against the poacher some knowledge that the oysters are the property of some individual. It was held under an old statute of 3 Jas. I. c. 12, that taking oysters in order to remove them to another quarter, was not within the description of those who used a destructive engine;[2] but under the 24 & 25 Vict. 96, § 26, if the taking is felonious, or wilfully and unlawfully, the object is immaterial.

Navigating near Oyster Beds—When an oyster bed is situated in a navigable river, where vessels are in the practice of navigating, it often happens that injury is done by grounding of the vessel. The rule is, that those who navigate are entitled to go upwards and downwards, though they might not be able to reach the port or the deep water in one tide without grounding, and even if such grounding subjected them to compensation for injury done, that does not affect the nature of the right in respect to time of enjoyment. The river being a highway, the public have a right to use it at all times. It is possible that unreasonably large masses of oysters deposited in the bed of a navigable

[1] *Padwick* v. *Knight*, 7 Exch. 854; *Mayor of Lynn Regis* v. *Taylor*, 3 Lev. 160; *Tyson* v. *Smith*, 9 A. & E. 406.

[2] *Bridger* v. *Richardson*, 2 M. & S. 568.

river may amount to a nuisance, and obstruct the navigation.[1] Nevertheless, those who navigate are bound to use due care and skill, so as to avoid doing more damage than is actually necessary, and if they wilfully run against oyster beds which they know to be at a particular spot,[2] and which they might have avoided, they are liable to an action on the case.

Corporation Property in Oyster Beds.—Oyster fisheries frequently belong to corporations who have power under some grant or custom to make bye-laws for the regulation of the fishery. In such cases illegal bye-laws are sometimes made, an instance of which occurred in the case of the Free Fishery of Whitstable.[3] This company held the oyster fishery within the manor and royalty of Whitstable, Kent, from time out of mind as tenants under the lord, on payment of a certain annual rent. The lord held a court of dredging, which used to make orders for regulating the company and oyster fishery, with fines and penalties for the breach of such orders. They made a bye-law that no freeman should send oysters to market from any other ground than that of the company, under a penalty of 10*l.*, and until such penalty were paid, he should be excluded from all shares of the profits. It was held that this bye-law was illegal and void, for, assuming the power to impose penalties, this superadded an extraordinary mode of recovering payment, which went beyond the law. Bayley, J. said the effect of such a bye-law would be

[1] *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339.
[2] Ibid.
[3] *Adley* v. *Reeves*, 2 M. & S. 53.

to mulct the party to the whole extent of his profits, however great they may be, supposing he had not the means of paying 10*l.*

Close Season as to Oysters.—Oyster fishing under the convention between Great Britain and France, 6 & 7 Vic. c. 79, opens on 1st September, and closes on 30th April. All oysters found on board a fishing vessel at any time from 1st May to 31st August, may be seized by officers of the navy or coast-guard service, and thrown overboard; and all dredges, or other implements for catching oysters found during such time on board, or sunk in the sea, may be seized by the same officers.[1] No oysters taken in the seas between the United Kingdom and France, shall be imported into the United Kingdom between 1st May and 31st August, and all oysters so imported from vessels there fishing, shall be taken to have been illegally imported till the contrary is proved, and the officers of customs may seize and destroy any oysters so illegally imported.[2] The master, or person in charge of any British vessel on board of which oysters, or any dredge or other implement shall be so illegally found, shall be guilty of an offence, and on conviction shall be liable to a penalty of not less than 8*s.* or more than 3*l.*, or to be imprisoned with or without hard labour for not less than two days, or more than ten days; and on a second or subsequent conviction, to a penalty not exceeding 6*l.*, or an imprisonment, with or without hard labour, for any time not longer than twenty days.[3]

[1] 18 & 19 Vict. 101, § 1.
[2] Ibid, § 2. [3] § 3

CHAP. VI.

CIVIL REMEDIES FOR OBSTRUCTION AND INVASION OF FISHERIES.

OWNERS OF FISHERIES CLEARING RIVER—IF QUO WARRANTO LIES TO TRY RIGHT TO FISHERY—ABATEMENT OF OBSTRUCTIONS—DISTRAINING NETS OF TRESPASSERS—EJECTMENT—REMEDIES BY ACTION—OBSTRUCTIONS OF COMMON FISHERY—PROOF OF ANCIENT USER—TWO COMPETING GRANTS—OPPOSITE RIPARIAN OWNERS—NON-USER OF FISHERY—REMEDIES AS TO SEVERAL FISHERY—REMEDY AS TO FREE FISHERY—OBSTRUCTION OF COMMON OF FISHERY—REMEDIES IN CHANCERY.

Owners of Fishery clearing River.—It has been said by Hawkins,[1] that "if a river be stopped, to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns who have a common passage and easement therein, may be compelled to do it." But no authority is given for this statement as regards the owner of a piscary; and even the owner of a sunken ship which obstructs the navigation is bound to do nothing more than erect a buoy over the place.[2]

[1] 1 Hawk. P. C. c. 75, § 13.

[2] *Harmond* v. *Pearson*, 1 Camp. 515; *R.* v. *Watts*, 2 Esp. 675. If owing to a wear in a navigable river becoming stopped up, annoyances should be caused to adjoining owners, the Commissioners of Sewers may have jurisdiction to compel a repair. 3 & 4 Wm. IV. c. 22, § 10.

If Quo Warranto lies to try Right to Fishery.—There seems no authority for the dictum that a *quo warranto* lies to try the right to a several fishery.[1]

Abating Obstructions of Fishery.—The right of abating a nuisance is incident generally to all substantive rights of property. Blackstone observes,[2] "Whatever unlawfully annoys or does damage to another is a nuisance, and such nuisance may be abated, that is, taken or removed by the party aggrieved thereby, so as he commits no riot in the doing of it. If a house or wall is erected so near to mine that it stops my ancient lights, which is a private nuisance, I may enter my neighbour's land, and peaceably pull it down. Or if a new gate be erected across the public highway, which is a common nuisance, any private individual passing that way may remove it. And the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice." The

[1] Though Holt, C. J. threw out a dictum which may have been applicable to former times (*Warren* v. *Mathews*, 1 Salk. 357) that a *quo warranto* might be brought to try the right of the grantee under the Crown to an exclusive fishery in the river Exe, it is not likely the Court of Queen's Bench would, in the exercise of its discretion, give leave to issue such a writ in modern times. Per Bayley, J. in *R.* v. *Ogden*, 10 B. & C. 233. In modern practice the writ is confined to cases of usurping an office, whether created by charter alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office. *Darley* v. *the Queen*, 12 Cl. & F. 541. This rule is the less likely to be relaxed, seeing that other remedies are available.

3 Bl. Com. 5,

generality of this statement has been materially contracted by modern decisions. For it has been held that in the case of a nuisance on a highway, a private individual cannot of his own authority abate it, unless it does him a special injury, and he can only interfere with it so far as is necessary to enable him to exercise his right of passing along the highway, and no further.[1] And in the case of a private nuisance, for example, leaving filth near the windows of a dwelling-house, one cannot resort to the remedy of abatement without first giving notice, unless the party was the original wrong-doer, or was guilty of some default in not performing some obligation incumbent on him.[2] In short, to justify taking the law into one's own hands, there must be some pressing danger to life, health, or liberty, which cannot, without serious detriment, wait to be redressed by the ordinary course of an action or other civil remedy. In this view an abatement is a remedy which requires such delicate handling to escape the consequences of the least abuse, excess, or oppression, and is so seldom legitimate, except in very strong and peculiar cases, that it is not to be recommended as a remedy at all. It will be seen that, as regards its application to rights of fishery, it is in general available only where the removal of the obstruction or nuisance is a matter of pressing urgency, which requires a remedy other than what is usual in other wrongs. If, for example, a lessee

[1] *Dimes* v. *Petley*, 15 Q. B. 276; *Davies* v. *Mann*, 10 M. & W. 546; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339; *Bridge* v. *Grand Junction R. Co.* 3 M. & W. 244.

[2] *Jones* v. *Williams*, 11 M. & W. 176.

of a fishery exercises the right of fishery as a necessary livelihood or trade, and an obstruction of the right, by the construction of a wear or otherwise, prevents its exercise, he might be justified in resorting to this remedy. Or if a tenant of a manor has a common of piscary for the sustenance of his family, he may in some cases require to abate a nuisance, taking care, however, not to interfere with the soil, which he has no right to do. But in the ordinary case, as between proprietors of a fishery in a private river, the necessity of abating a nuisance will seldom be justifiable, since an obstruction can scarcely be supposed to press upon life, health, or liberty; therefore the ordinary remedies by action or suit must be preferred.

Even though engines are used which are illegal by statute, this gives no right to any person to abate them as nuisances if not nuisances at common law. Thus no one, not even the conservators, without express authority under some statute, can destroy the engines, and seize and carry away the fish so caught; they can only pursue the remedy given by the statute.[1] Express power, however, has been given by the Salmon Fishery Act to the owner of a fishery or the subjacent land to seize the nets, &c. of poachers.[2]

Distraining Nets of Trespassers.—It has been said that the owner of a several fishery can at common law distrain the nets and implements of trespassers *damage feasant.* The doctrine, however, is weak authority for

[1] *Bulbrook* v. *Goodere*, 3 Burr. 1768.
[2] 24 & 25 Vict. c. 96, § 25, *ante.*

this.[1] It cannot be safely laid down that the nets, fishing-rods, &c. of trespassers on a several fishery can at common law be seized and taken from the trespasser by the owner of the fishery, even where he is also owner of the soil; the utmost that can be done *brevi manu* is to push the trespasser with his implements off the *locus in quo*. But the Larceny Act, 24 & 25 Vict. c. 96, § 25,[2] as already stated, gives a limited remedy of this kind. The only remedy at common law is an action of trespass. And it need scarcely be observed that *à fortiori* the owner of a free fishery, or a person having only a common of fishery, can still less take the law into his own hand,

[1] *Reynell* v. *Champernoon*, Cro. Cas. 228, which is as follows:—"Trespass for taking and cutting of his nets and ours. The defendant justifies, for that he was seised in fee of a several piscary; and that the defendant, with divers others, endeavoured with their oars to row upon his water, and with their nets to catch his fish; and for the safeguard of his fishing he took and cut the nets and oars, &c. Thereupon the plaintiff demurs. It was moved by Whitlock that this plea is not good, for he cannot by such colour cut the nets and oars. And of this opinion was all the Court, for the reason *supra*. But he might have taken the nets and oars and detained them as *damage feasant*, to stop their further fishing. Whereupon it was adjudged for the plaintiff." This was at most an *obiter dictum*. It may be assumed that the owner of the several fishery had also the soil. Now to justify a detainer *damage feasant*, the nets and oars must have been doing the mischief of themselves; whereas the report obviously assumes some one was at the time using the nets and oars, in which case the utmost remedy the common law would allow would be, to enable the owner of the fishery to use force in pushing or driving away the party so trespassing, and his implements along with him. But the chattels in question could not be taken, unless they were at the moment actually obstructing the owner of the fishery in his user of the fishery, in which case it would more properly be called the abatement of a nuisance than the detainer of things *damage feasant*. At all events, the chattels could not be taken *in invitum* of the party using them as a seizure and detainer of *damage feasant* generally implies.

[2] *Ante*, p .

and seize the fishing gear of trespassers in the manner above described.

Ejectment.—The action of ejectment is the remedy for recovering possession of a corporeal tenement when the party has the right of entry. Ejectment, however, will not in general lie for a fishery, for *primâ facie* a fishery is only a profit *à prendre.* Ejectment will lie in those cases only where the the soil covered with water is claimed, for the soil will carry the fishery without if they have not been dissevered.[1] The observation of Ashurst, J. that ejectment lies for a fishery,[2] no doubt had reference to a case where the soil and fishery went together.

Remedies by Action.—The ordinary civil remedies for obstructions or invasions of the right of fishery are actions of trespass and trespass on the case, and in equity injunctions and bills of peace. It depends on the nature of the right, and the nature of the invasion or nuisance, which of the two actions at law is the appropriate remedy; though the importance of distinguishing between the two forms of action no longer exists, since different forms of action may be joined together.

It will be recollected that rights of fishery are substantially of three kinds. First, there is the common fishery, which is the right of every member of the public to fish in the sea and navigable rivers without obstruction in all parts thereof, except where some

[1] *Waddy* v. *Newton*, 8 Mod. 276; *Herbert* v. *Laughluyn*, Cro. Cas. 492.

[2] *R.* v. *Old Alresford*, 1 T. R. 358.

individual has a legal right to a several fishery there. Secondly, there is the several fishery, which is the exclusive right of fishing either in a part of the sea or of a navigable river, or in a private stream; it may or may not be accompanied with the right to the soil. Thirdly, there is the free fishery, being a right of fishing concurrently with one or more other individuals. And a common of piscary is substantially the same right, the distinction chiefly consisting in the supposed origin of these two rights respectively, the place where the fishery exists being the soil of another.

Obstructions of Common Fishery.—First, obstructions of common fishery. The sea and navigable rivers being open to all the public, each person has an equal right to fish in all parts, except where a several fishery of ancient origin legally exists.[1] The rights of all being equal, it follows that no individual can acquire a prescriptive right to fish in any particular part of the sea or stream The maxim will be, first come first served. If one fisher were to interfere with another, it could only be by persisting in fishing too near a spot where another has first taken up his position, and thereby wilfully preventing him exercising his legitimate rights. The person so interfering would be liable to an action on the case, if not to an indictment. No person in modern times can set up prescription as the foundation of a right to attempt to fix nets, or construct a wear or trap in a particular spot[2] in the sea or a navigable river, any more than a man can prescribe for a right of constantly

[1] See *ante*, p. .

[2] *Ward* v. *Cresswell*, Willes, 265.

standing in a particular spot in a highway. As such attempt tends to obstruct all others who may wish to fish in the same spot, he would not only be liable to an action on the case by any person specially injured, but he may be subjected to an indictment on the prosecution of any person whatever, though for obvious reasons such a remedy has probably never been resorted to.[1]

In regard to conflicts between the public and individuals, the burden is on the individual who claims a several fishery in the sea or a public navigable river, to

[1] A case of some nicety as to the exact form of remedy arose in this way (*Young* v. *Hickens*, 6 Q. B. 606) :—The plaintiff was fishing for pilchards, and had drawn his net partially round the fish, leaving a space of about seven fathoms open, which he was about to close with a stop-net. Two boats belonging to the plaintiff were also stationed at the opening, and splashing the water about, for the purpose of terrifying the fish from passing through this opening. At this time the defendant rowed his boat up to the opening, and so prevented the plaintiff taking the fish. The plaintiff brought an action of trespass, on the ground that he had at the time acquired possession of the fish, and that the defendant took them from him; and so the point arose whether the circumstances amounted to custody or possession by the plaintiff of the fish. The Court held there was no possession by the plaintiff. Lord Denman said, "It appeared almost certain that the plaintiff would have had possession of the fish but for the act of the defendant; but it is quite certain that he had not possession—he had not acquired actual power over the fish. It might be the defendant acted unjustifiably and did a wrongful act, for which he might be liable in a proper form of action." Patteson, J. :—"We cannot support the plaintiff's issue, unless we are prepared to say that all but reducing into possession is the same as reducing into possession. Whether the plaintiff has any cause of action at all is not clear; possibly there may be a remedy under the statutes." Wightman, J. added, "If the property in the fish was vested in the plaintiff by his partially enclosing them, but leaving an opening in the nets, he would be entitled to maintain trover for fish which escaped through that very opening." This case occurred when forms of action were important.

ow that he has enjoyed the fishery from time immemorial, and hence ancient user is the main point of dispute.

Proof of Ancient User.—The chief substantial interference with a common fishery is where a wear or similar contrivance exists. As already stated, such wears are *primâ facie* a nuisance, and illegal; but if they have existed from a period antecedent to Magna Charta, under a grant from the Crown of the right, they are legal. If, therefore, the owner of a wear were indicted for an obstruction, or if, as would be the more convenient remedy, an action on the case were brought against him, or if his wear were pulled down, and he brought an action of trespass, he is bound to plead and prove his title or prescriptive user, which presumes a title. Such a prescriptive right may be appurtenant to a manor.[1] In proving the title, possession as of right for thirty years and upwards is a *primâ facie* title.[2] But the case will be weak unless ancient titles are produced, recognising or assuming a grant from the Crown, as well as evidence of long enjoyment.[3] In such cases the principle applicable is, that where a person is shown for a series of years to have been in the undisputed enjoyment of property, or of any of its rights, incidents, or immunities, exercising the rights of property, and performing its duties, as it is not easy to believe that a person would thus be left by the true owner long and freely to enjoy what was not his own, a jury will be

[1] *Rogers* v. *Allen*, 1 Camp. 309.
[2] 2 & 3 Wm. IV. c. 71.
[3] *O'Neill* v. *Allen*, 9 Ir. C. L. Rep. 132.

allowed to presume a grant, or surrender, or release, or even a matter of record, according to the nature of the case.[1]

In regard to all ancient grants and documents, modern usage is evidence to show what was the meaning of such grant or document, whenever a question arises as to what passed by a particular grant.[2] Proof of modern user, carried back as far as living memory can be reasonably expected to apply it, is evidence from which still more ancient user may be inferred; and unless there be something in the nature of the subject-matter or in the other evidence to encounter the inference, or to suggest the necessity of other proof, may be evidence from which a jury may presume prescriptive title. Again, in favour of long possession, a jury will be justified in presuming a grant or patent from the Crown, or even an Act of Parliament.[3]

Ancient leases of a fishery are good evidence for a claimant, for they are acts of ownership, showing the ancient state of the possession.[4] So bills and answers in chancery between parties litigating the title may be admissible.[5] And so verdicts in former actions, but not an award, unless the party or his predecessors were privy to such award.[6]

[1] Per Hayes, J. and Greene, B. *Little* v. *Wingfield*, 11 Ir. C. L. Rep. N. S. 63; *Mayor of Hull* v. *Horner*, Camp. 102; *Lopez* v. *Andrew*, 3 M. & Ry. 329 *a*; *Roe* v. *Ireland*, 10 East. 284.

[2] *Duke of Beaufort* v. *Mayor of Swansea*, 3 Exch. 413.

[3] *O'Neill* v. *Allen*, 9 Ir. C. L. Rep. 132.

[4] *Malcolmson* v. *O'Dea*, 9 H. L. Cas.

[5] Ibid.

[6] *Wenman* v. *Mackenzie*, 5 E. & B. 447; *Evans* v. *Rees*, 10 A. & E. 151; *Kinnersley* v. *Orpe*, 2 Doug. 517.

As a general rule, ancient grants are to be construed by the light of subsequent usage.[1]

[1] In an action of trespass for breaking and entering a close covered with water, the defendant pleaded that it was an arm of the sea, where all could fish. At the trial ancient grants of wreck were produced by the plaintiff, who proved that for forty years and upwards he raised an embankment, used the seaweed and gravel, and the inhabitants of Poole had never made any opposition, Dallas, C. J., *Chad* v. *Ulsed*, 5 Moor, 185, laid down the law thus :—"Where a grant has been produced, no usage, however long, can alter or counter-rail the terms of such grant, for what is done under usurpation cannot constitute a legal usage. The fundamental rule laid down is, that when an ancient grant contains general words, the best exposition of it is by constant and uninterrupted usage. Unless, therefore, an usage and enjoyment for forty years can be shown to have originated in usurpation, it is evidence from which usage anterior to that time may be presumed. Here the modern usage, as connected with the ancient, affords a strong exposition of the meaning of the original grant of Henry II. The general rule is, that if the language of a grant be obscure, or its construction doubtful, general usage may be resorted to to expound, although not to controul or contradict the instrument, and such usage is a strong practical exposition of the meaning of the parties. Ancient grants, therefore, are to be construed by evidence of subsequent usage, however general such grants may be, reducing it to a mere question of fact as to the mode of right, which has been generally and usually exercised. I also agree that if usage be traced no higher than forty years, and applied to establish an exclusive right over an arm of the sea, such general usage for that period would not put an end to or destroy the rights of the public to fish there, but for the last forty years the evidence adduced at the trial was as strong as it possibly could be to establish the plaintiff's claim as to the usage since that time, as the wall was then raised by Mr. Sturt, from whom he purchased, and the embankment made in the sight of the corporation and all the inhabitants of the town of Poole, and his was a strong act of ownership. . . . It has been asked if the Corporation of Poole had been in confederacy with Mr. Sturt when the wall was built, and did not choose to interfere with the subsequent usurpation by him and the plaintiff, whether it would deprive the fishermen of that town of their right to fish over the *locus in quo?* Certainly not. But if it touched the interest of all the inhabitants of Poole, and so general a right had before existed, it must then be presumed as a matter of course that any usurpation of that right had before existed." And Richardson, J. said, "an usage of forty years' duration is not only evidence for that period, but affords a

Two Competing Grants.—It sometimes happens that two competing grants are set up from the Crown. In such a case it is for the jury to presume from the evidence whether there had not been a sub-grant from the predecessor of one of the parties to the other. Thus in the river Moy, in Sligo, the plaintiff in a case gave evidence of a grant from the Crown which covered the whole right claimed, but there were proofs of adverse user in the defendant proved by parole evidence. The Court held that the difficulty could be got over by presuming that the plaintiff's ancestors made a sub-grant to the defendants, which was lost.[1]

presumption of a similar and anterior usage if nothing be shewn to the contrary."

[1] *Little* v. *Wingfield*, 11 Ir. C. L. R. 81. In this case a written grant was overthrown by parole evidence of adverse user, and on this last point O'Brien, J. observed:—"In the present case it does not appear how the legal origin of the long possession and enjoyment of the fishery claimed by the defendant can be accounted for except on the presumption of a grant. And, in my opinion, it is not necessary in leaving the question of a presumption of the grant to state either the names of the parties by whom or the time when such grant should be presumed to have been made. Instances may occur in which an uninterrupted possession and enjoyment of an incorporeal hereditament for over two hundred years would be established without being able to show the period, or to account for the commencement or origin of such possession. In such a case the presumption of some grant having been made would be almost conclusive, and yet it may be impossible from the length of time to furnish the jury with any materials whatever for deciding at what time prior to the earliest period when such possession could be proved to have been had, or by what party such grant might be presumed to have been made. The result of the plaintiff's proposition would be, that the greater the length of possession, and the stronger the ground for presuming a grant, the greater would be the difficulty of a jury acting on such presumption. All the jurors may be satisfied that there had been a grant executed at some antecedent period by some party competent to do so, and yet they may not agree as to the period when or the party by whom it had been executed.

Where two parties claim the exclusive right, the mode of proving that the entire fishery belongs to one of the parties, is the same as proving that the soil belongs to one, contrary to the ordinary presumption. Thus, in an action of trespass, *quasi clausum fugit*,[1] the plaintiff claimed the whole bed of the river flowing between his and the defendant's land, the defendant contending that he was entitled to half. It was held that evidence of acts of ownership exercised by the plaintiff upon the beds and banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm of *C* adjoining the defendant's land, and also of repairs done by the plaintiff to a fence which divided *C's* farm from the river, and was in continuation of a fence dividing the defendant's land from the river, was admissible for the plaintiff.[2]

Such a restriction upon this doctrine of presumption would, in many cases, nullify its principles and defeat the objects for which it was established."—*Little* v. *Wingfield*, 11 Ir. C. L. P. Rep. 81, 2.

[1] *Little* v. *Wingfield*, 2 M. & W. 329.

[2] On this subject Parke, B. said: "Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed. Evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spots in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove this title to a close the claimant may give in evidence acts of ownership in any part of the same inclosure, for the ownership of one part causes a reasonable inference that the other belongs to the same person, though it by no means follows as a necessary consequence, for different persons may have balks of land in the same inclosure, but this is a fact to be submitted to the jury. It has been said that the defendant had no interest to dispute acts of ownership not opposite his own land, but the ground on which such acts are admissible is not the

Opposite Riparian Owners.—In one case the owner of lands on one side of a fresh-water inland river brought an action against the owner of lands on the other side, for breaking and entering his several fishery. The defendant had fished with a net nearer the plaintiff's side than his own. The plaintiff produced evidence of the appointment of water-bailiffs by himself, who had watched the river for upwards of forty years and warned off strangers, and proved that he enjoyed the exclusive fishing with nets for upwards of forty years over the whole river. The defendant, however, proved title to the soil in his half of the river, and therefore either to fish in half of the river, or as tenant in common of the whole river; but in consequence of removing to a residence at a distance, they had not exercised their right for about thirty-five years, and the plaintiff's title was sustained.[1]

acquiescence of any party; they are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight. That observation applies only to the effect of the evidence. What weight the jury might attach to it is another question."—*Ib.* 332.

[1] Lefroye, C. J. thus laid down the law applicable:—"Each party is entitled to the soil of the river up to the middle of the stream *usque ad medium filum aquæ*, and is therefore entitled also, as a matter of right, to the fishing therein, not as an easement *in alieno solo*, but as a right of fishery in the party's own land; and inasmuch as the river is not divided by any abutments marking the respective rights of the parties, and as the fish run from one side to the other, this right of fishery is in its very nature a species of tenancy in common. The plaintiff claims not a tenancy in common in the fishery, nor a right of fishery half-way over the river, but the exclusive right of fishery in the whole river. But as there is a tenancy in common of one kind or another, an exclusive right of fishery is not to be presumed from the mere fact of the plaintiff's possession or enjoyment and use of the whole fishery, by spreading his nets across the river from one side to

The law is well settled that where a stream divides the lands of two proprietors, each can only fish, whether with nets, rods, or any other implement, up to the middle of the stream and no further. If either casts his net or his angling line beyond the *medium filum*, he is liable to an action of trespass, and if there is no claim of right to the whole fishery, he may (if he in person trespass beyond the line) even commit the criminal offence of poaching; but unless his act amounts to an offence under 24 & 25 Vict. c. 96, § ,[1] he cannot be punished summarily, or given into custody.

Non-user of Fishery.—Can a fishery derived by express grant from the Crown be lost by non-user? This point was raised in an Irish case, but was not decided. Pigot, C. J. observed: "In a variety of instances no doubt, patent rights to offices may became forfeited by non-user, that is, by the non-performance of the duties of the office granted by the Crown. But in this case the question does not arise; there was no evidence of non-user; there was an absence of evidence of user as

the other, for each of the tenants in common had a right to do what the plaintiff had done here. If, indeed, one of the tenants in common had erected abutments in the middle of the river, or by any other act had entirely destroyed and put an end to the enjoyment in common, that might be an ouster; but the mere user by one tenant in common of that which belongs to them both in common can never *per se* raise the presumption of a grant; and to hold that the tenant in common who does not exercise his right, is, after thirty years, to be presumed by the mere non-user to have made a grant of it to his co-tenant in common, would indeed be a monstrous result."—*Beauman* v. *Kinsella*, 8 Ir. C. L. R. 291.

Evidence of orders to one's water-bailiffs is not admissible in aid of title, without proof of acts done by the bailiffs in pursuance of those orders. *Beauman* v. *Kinsella*, 11 Ir. C. L. R. 249.

[1] *Ante*,

to a period to the greater part of which it was impossible, and to the remainder (the latter part) of which it was very difficult, to apply the testimony of living witnesses, and as to none of which was there any ground for imputing that there was any documentary evidence which was withheld; every day or every year cannot be made the subject of distinct testimony in inquiries of this nature.[1] Non-user at intervals is quite compatible with retaining the right, for the owner of a fishery is not bound to fish and exercise his right. There is nothing to prevent his dedicating the right to the public, and if the non-user is coupled with proof of the public exercising the right undisturbed for several years, this may be good evidence of dedication, as in the analogous case of a right of way; but, as a general rule, the public cannot lose a public right by non-user.[2]

Remedies as to Several Fishery.—The action of trespass is the appropriate remedy for invading a several fishery.

It has been said that in order to maintain trespass, it is sufficient if the party, at the time when the act complained of was done, has the actual or constructive possession of the thing which is the subject of the trespass,[3] and that the owner of a several fishery has the exclusive right of taking the fish within particular limits, and thereby has the constructive possession of all fish within those limits, and may therefore in trespass

[1] *O'Neill* v. *Allen*, 8 Ir. C. L. R. 132.
[2] See *ante*, p. . *Noeght* v. *Winch*, 2 B. & Ald. 662.
[3] *Smith* v. *Miller*, 1 T. R. 480.

describe them as his fish.[1] But the true ground on which trespass lies for breaking a several fishery, even though the soil belongs to another, is, that the plaintiff is entitled to the exclusive possession of the water for the purpose of fishing there. Thus, a declaration recited that defendant with force and arms broke and entered a fishery, to wit the sole and exclusive fishery of the plaintiff in a certain part of a river then flowing and being over the soil of one F., and then fished for fish in the said fishery of the plaintiff, and the fish of the said fishery of plaintiff there found being in the said fishery chased and disturbed, and it was held by the Court of Exchequer Chambers, that the words "sole and exclusive fishery were at any rate after verdict equivalent to several fishery, and that the statement that the soil was in F. did not vitiate the count or render it necessary to deduce title from the owner of the fee. Moreover that trespass lay for the injury described.[2]

[1] *Smith* v. *Kemp*, 2 Salk. 637; *Child* v. *Greenhill*, Cro. Cas. 553; *Sutton* v. *Moody*, 1 L. Raym. 250; *Seymour* v. *L. Courtney*, 5 Bur. 2814; *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875, 1 D. & R. 347.

[2] *Holford* v. *Bailey*, 13 Q. B. 426.

Where the action of trespass is for breaking and entering the several fishery and taking fish, the taking of the fish is mere matter of aggravation; and the same importance is not now attributed to the want of a definite statement of the number of fish taken as anciently. In Playter's case, 5 Co. Rep. 34 *b*, it was held that the taking was a separate cause of action, and the omission of the nature and number of the fish was matter of substance.

[3] In declaring in trespass, it used to be common to add a *continuando*, *i.e.* that the defendant continued the trespass for a certain time; *Fontleroy* v. *Aylmer*, 1 L. Raym. 239. This is, however, in general, mere matter of aggravation, and need not now be pleaded to; but formerly, unless the *continuando* was certain, and expressed the quantity and quality of fish taken, judgment was arrested. *Howel* v. *Reynolds*, 1 Vent. 329.

Remedy as to Free Fishery.—Where a party has not a several fishery, but a free fishery only, *i.e.* a right co-extensive with the rights of others, much depends on

In the older cases, the action of trespass was brought for taking the plaintiff's fishes, and such a declaration was held good as regards a several fishery, because the plaintiff had a local property in the fishes. *Pollexfen* v. *Crispin*, 1 Vent. 122.

If a prescriptive right of fishing is set up as a defence to an action of trespass, the plea must state what kind of fishery is claimed, and to which estate it is appurtenant. *Anon*, Hardr. 407.

Where to an action of trespass for breaking a several fishery the defendant pleads *liberum tenementum*, the plaintiff may reply that it is his own freehold, and not that of the defendant. *Lambert* v. *Strother Willes*, 218.

Where an action of trespass is brought against five for fishing in a several and free fishery, one of the defendants may plead property in his master, and that he did it by his command, and traverse the right of free fishery stated in the declaration, and the defendant may reply *de injuria*. *Wine* v. *Rider*. 2 Mod. 67.

Where the plaintiff brought an action of trespass for fishing in the plaintiff's fishery, and the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing, and the plaintiff replied a prescription for the sole and several right of fishing, and traversed that every subject had the liberty and privilege of free fishing in the *locus in quo*, it was held this was a bad traverse, which the defendant might pass by in his rejoinder, and traverse the prescriptive right of the plaintiff. *Richardson* v. *Mayor of Orford*, 2 H. Bl. 187 (reversing the judgment of the Court below, in *Mayor of Orford* v. *Richardson*, 4 T. R. 437).

In an action of trespass for throwing down a wear appurtenant to the plaintiff's fishery, the defendant pleaded that the wear was erected across a navigable river, and was a nuisance and obstructed the navigation, and the defendant prostrated the same. The plaintiff replied that the part of the river in question was not a public navigable river, nor had the public a right of navigating there. Rejoinder, that when the channel of the river was choked up, the lieges could go over the part in question. Sur-rejoinder, that the public had no right to navigate at that point. Issue thereon. *Williams* v. *Wilcox*, 8 A. & E. 314. It was held in this case that it was not necessary for the plaintiff to set out in his replication how or by what grant the *locus in quo* became other than, and wholly distinct from, the channel in which the right and user of public common navigation existed. *Ibid.*

the nature and origin of the title, as to what is the proper remedy. As already explained, a free fishery is a right which is not exclusive, but co-extensive with the rights of others, and in general it implies no right to the soil. It is quite possible, however, to suppose a case where both the soil and the fishery are in several owners, in which case they must be joint owners or tenants in common, and their remedy against a trespasser would be by a joint action, inasmuch as the wrong would be an entire thing. If the soil was in *A* and *A* had merely a free fishery in the water, then he would be able to maintain an action of trespass against a stranger, by virtue of such ownership of the soil, and yet each of the others entitled to the free fishery could only have an action on the case for disturbance.

It was laid down that trespass does not lie for taking the plaintiff's fish in his free fishery, even after verdict, and judgment will be arrested.[1] And generally in order to support an action of trespass to goods, the plaintiff must at the time of the act committed have either the actual or constructive possession of the goods.[2] An illustration of constructive possession is where the lord of a manor brings trespass for an estray or wreck taken by a stranger before seizure by the lord, and an executor has a constructive possession of the testator's goods on the death of the testator.[3]

It has, however, been sometimes said or assumed[4]

[1] *Upton* v. *Daukins*, 3 Mod. 97.
[2] *Smith* v. *Willes*, 1 T. R. 480.
[3] Ibid.
[4] *Smith* v. *Kemp*, 2 Salk. *b*. 37; Co. Litt. 4 *b*. 122 *a*; 2 Bl. Com. 40; *Child* v. *Greenhill*, Cro. Cas. 554; *Vivian* v. *Blake*, 11 East, 263.

that trespass lies for breaking[1] a free fishery, and many cases will be found of actions of trespass for a several fishery in one count, and a free fishery in another count; and Parke, B. said that used to be the common practice. But it will be found that it depends on how the term was defined, whether those cases are authorities. If the definition above used for the reasons already mentioned be adopted, viz. that a free fishery is a fishery where several persons have a co-extensive right, but the soil is not in them, it will be obvious that trespass is not the proper action, except where he who is also owner of the soil sues, and the others can only have an action on the case for disturbance. Practically, however, the disturbance is now of no great consequence, seeing that different forms of actions can be joined.[2]

Obstruction of Common of Fishery.—Where a party is entitled to a common of fishery which is interfered with, his remedy is an action on the case for disturbance: seeing that he has in general no right to the exclusive possession, trespass will not lie. But if the right of common be exclusive, it has been said an action of trespass will lie.[3] Where the right has been created by deed in favour of two or more persons, the right of apportionment will be competent as between those parties.[4]

[1] *Holford* v. *Bailey*, 13 Q. B. 431.

[2] Holt, C. J. said, "That free fishery was where the right of fishing is granted to the grantee; and such grantee hath a property in the fish, and may bring a possessing action for them without making any title." —*Smith* v. *Kemp*, 2 Salk. 637. He seems to have thought it was analogous to free warren, but this doctrine is inconsistent with the other leading authorities.

[3] *Wilson* v. *Mackreth*, 3 Burr. 1824.

[4] *Hargrave* v. *Congleton*, 12 Ir. C. L. R. 368, an analogous case, viz. a common of turbary.

In setting up a prescriptive right, this must be shown to be not too general and uncertain, for if it merely amounts to a general right on the part of all the Queen's subjects, it is bad. A prescription must be for some definite right claimed as appurtenant to certain tenements, describing them particularly.[1]

Moreover, in setting up a plea of a common of fishery, care must be taken to describe it not as a common fishery, which is a different thing.[2]

Remedy in Court of Chancery.—If the owner of a several fishery in a stream not navigable finds his fishery invaded by an individual, as for example, a neighbouring owner, the remedy of an action of trespass, *quare clausum fregit*, is generally sufficient for the purpose, and will dispose of questions of title, and disputes as to boundary. If a number of individuals, such as the inhabitants of a vill, claim a common of fishery there by custom, such a custom is bad, and cannot be sustained, and this has been the undoubted law for two centuries.[3] And in the latter case an action of trespass in the first instance against an individual, followed, in case of a verdict for the plaintiff, by a bill of peace in the Court of Chancery, will completely vindicate the right.

So where the party claiming a several fishery in the sea or a navigable river finds his right invaded, he may bring an action of trespass against the individual tres-

[1] *Ward* v. *Cresswell*, Willes, 265.

[2] *Bennett* v. *Costar*, 8 Taunt. 183.

[3] Gateward's case, 6 Rep. 60. *Lloyd* v. *Jones*, 6 C. B. 89; *Bland* v. *Lipscombe*, 4 E. & B. 713 *n*.

passer, for this action is competent, though the owner of the several fishery has no right to the soil in the *locus in quo*.[1] And the plaintiff is entitled to maintain such action, though no fish were actually taken by the trespasser,[2] and the declaration need not allege such taking, or any specific injury. The reason of this is, that wherever any act injures another's right, and would be evidence in future in favour of a wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury.[3]

If the several fishery is invaded by the public generally, or at least by numerous trespassers, the proper course is for the owner to bring an action of trespass against some individual, and after having established his right at law, he will then be entitled to file a bill of peace in a Court of Chancery, and thus obtain a decree which affects the public generally. A man cannot contend against all the Queen's subjects, and be expected to fight them in detail, for this litigation would be endless, and therefore a Court of Equity will grant a decree in a suit of a comprehensive kind, which will bind the public, even though the right claimed is in derogation of the public right, such as a several fishery in the sea or a navigable river. But, as already stated, the Court will only do so after the exact point in dispute has been first settled by an action at law.[4]

[1] *Holford* v. *Bailey*, 13 Q. B. 426.
[2] Ibid.
[3] *Patrick* v. *Greenway*, 1 Wins. Saund. 346 *b*.
[4] *Allen* v. *Donelly*, 5 Ir. Ch. R. 229; *Mayor of York* v. *Pilkington* 1 Atk. 282; *City of London* v. *Perkins*, 3 Bro. P. C. 602.

Thus the Irish Society having filed a bill of peace praying to be quieted in the possession of their several fishery in Lough Foyle, an issue was first directed to try whether they had an exclusive right of fishing there. At the trial evidence was given of ancient leases from the Irish Society to tenants, and payment of rent. The judgments in two previous actions brought by their lessees for disturbance of the fishery, were also given in evidence as reputation of their title. Brady, L. C. said, the case was within the class of cases where evidence of general reputation is admissible. The action by the plaintiffs' lessees had raised the very point in dispute, and was substantially their own action, and therefore the verdict and depositions were admissible evidence.[1]

Another case illustrates the hardships encountered by the owners of fisheries by the pertinacious trespasses of the public.[2] The purchasers of a fishery in the river Galway and Lough Corrib petitioned the Court of Chancery to be quieted in the possession and enjoyment of their several fishery. The defendants were represented by ten persons, who were paupers, who set up as a defence that the river was, except in a certain specified portion, open to the public, and had been so from time immemorial. Evidence was given on both sides, and the plaintiffs, who produced grants from the Crown, and evidence of user, contended that the evidence of user on the part of the defendants was evidence

[1] *Allen* v. *Donelly*, 5 Ir. Ch. R. 452.
[2] *Ashworth* v. *Brown*, 10 Ir. Ch. R. 421.

merely of a succession of trespasses. There had been a trial of an issue some years previously, which settled the right to the fishery in the plaintiffs. The M. R. accordingly, without putting the plaintiffs to any further trial, granted the decree declaring the petitioner's rights and continuing the injunction.

CHAP. VII.

THE LAWS OF ANGLING.

NO RIGHT AT COMMON LAW TO ANGLE IN ANOTHER'S WATERS—ANGLERS, AS POACHERS, HOW PUNISHED—ANGLING IN DAY-TIME—WHEN ANGLERS MAY BE APPREHENDED—ANGLERS' ROD AND TACKLE, WHEN SEIZABLE—REMEDIES AGAINST ANGLER-POACHING—CLAIM OF RIGHT TO ANGLE—CLAIM OF INHABITANTS OF VILLAGE OR TOWN TO ANGLE—RIGHT TO THE FISH ANGLED—PURCHASE OR LEASE OF ROD-FISHING—ANGLING SALMON.

No Right at Common Law to Angle in another's Waters.—It is sometimes said to be a popular impression that angling is a privileged pursuit in this respect, that if the angler follow up the banks of a stream or river and confine himself to fishing without any unnecessary trespass he cannot be prevented doing so; and that if the leave of the owner of the lands is occasionally asked by him this is only a gratuitous courtesy which he is not bound to render. If, however, this is a general impression, it is founded entirely on a mistake. In the first place, the common law, apart from statute, knows no distinction between rod fishing and any other kind of fishing. All kinds of fishing are merely modes of catching fish, and the right of catching fish in a water is a

right of fishery, which from its nature is an exclusive thing, being one of the incidents of property. Whoever is the owner of the land beneath the water, which generally means the same thing as the owner of the soil abutting on the water, or the riparian owner, has, as one of the incidents of ownership, the exclusive right of catching all the fish he finds in the superincumbent water. Property is essentially an exclusive thing, and the incident of fishing is also so. All other persons, therefore, except the owner of the soil beneath, or the riparian owner, have no more right to fish in his water than they have a right to seize any other perquisite of the soil. Whether a stranger fishes with a net or a rod can make no difference in point of law: it is the taking of the fish, not the manner of taking it, that is important. It follows, therefore, that no stranger whatever has a right to enter upon land without the owner's permission (and land must always have an owner), and walk either along the banks or wade in the bed of the stream to fish there. If he do so without the permission of the owner of the land, he commits a trespass in the eye of the law, for which the owner can bring an action against him and recover damages.

It may be taken, therefore, as a general rule, that all anglers who go and fish in a stream without the permission of the owner of the land are trespassers or poachers. If permission is given by such owner the case is altered. Sometimes an owner is careless of his rights, and tolerates strangers, who, knowing this lenience, invade his fields to angle or fish with nets, especially to angle. This, however, is a gratuitous concession on his

part, and he can at any moment, without notice, resume his rights, and treat all such intruders as trespassers. Whether the land on which the trespasser goes is waste or cultivated, fenced or unfenced, it is equally a trespass for him to go there without the owner's permission. This has always been the law, and is still the law, as regards all rivers and streams whatever; and the same is true also of the sea. In all cases the land on the banks or shore belongs to some individual owner unless there is a highway at some point of access. If a stranger goes along the highway (and the shore between high and low water mark is on the footing of a highway, being open to the public use), and so gets into a boat, he may then exercise the right he has as one of the public to fish in the sea and in navigable rivers, unless some individual has a several fishery there, as may well be.[1] In other cases, he has no right whatever to go near a stream or water to fish, for he can only do so by committing a trespass; but, as is wellk nown, owners of waste and unprofitable land near the sea or a navigable river seldom actively interfere to prevent strangers walking along the banks or shore, though in strictness they can always do so at will, unless there is a public highway at the place in question.

Such is the doctrine of the common law as regards angling and fishing generally, and the law is still unchanged by statute, for the statutes merely give a shorter and more summary remedy for the grosser cases of trespassing, and in doing so the legislature has in some cases either awarded a milder punishment to mere anglers as

[1] See *ante*, p. .

compared with net fishers, or exempted anglers from any criminal punishment whatever. Nevertheless it is not to be supposed in the latter case that anglers are not liable to any punishment, for they are always liable to an action at law, though that it is a remedy in most cases so costly and tedious as to be practically no remedy at all.

Anglers as Poachers, how Punished.—Angling, therefore, being in point of law on the same footing as net and other kinds of fishing, the primary rule is, that all anglers, unless they have the permission, express or implied, of the owners of the water, are poachers, and are punishable as such, except they are exempted by some statute. In stating in detail, therefore, the laws affecting angling, it is merely necessary to recapitulate shortly what has been already stated as to other kinds of illegal fishing. Since angling differs in no respect in point of law from any other mode of fishing, it follows that if the public generally have a right to fish in a particular water, that is, if there in a common fishery there, then any person may angle as well as use nets or other apparatus, and may catch whatever fish he can. If, however, the public are excluded, as they sometimes may be, from the sea or a navigable river by a grant of the Crown or by prescriptive user in favour of some individual, or if they are excluded, as they must be in point of law, from private waters or streams, then an individual stranger has no more right to angle in such water than he has to use a net or other apparatus. All strangers who fish in waters where there is a several fishery, or a free fishery, or a common of fishery belong-

ing to some other person or number of persons, are equally poachers, whether they catch or seek to catch the fish with a rod or a net or any other engine. Hence, if an angler, without leave of the owner of the fishery, unlawfully and wilfully take or destroy fish by angling in a pond or stream running through land *adjacent* to the dwelling-house of the owner of the fishery, he is guilty of a misdemeanour[1] in the same way as those who fish with nets. The same offence committed in a water not adjoining a dwelling-house of the owner, is treated with more leniency.

If a stranger, without leave, angle, *i.e.* attempt to catch fish (whether successfully or not is immaterial) in any water not adjacent to a dwelling-house, but in which there is a private right of fishery (and this enactment is nearly universal in its application to fisheries which are not common or public), he incurs, besides the value of the fish, a penalty of *5l.*[2]

Angling in the Daytime.—If, however, the illegal angling take place between the beginning of the las hour before sunrise and the expiration of the first hour after sunset, the first of the above two offences, *i.e.* poaching in a water near a dwelling-house, is not a misdemeanour, but is only punishable by a fine of *5l.*; and the second offence above described, *i.e.* poaching in a water not near a dwelling-house, is punishable by a fine of *2l.*[3] If the penalty awarded by the Justice shall not be paid either immediately after conviction or at the

[1] 24 & 25 Vict. c. 96, § 24, *ante*, p. .
Ibid.
[3] 24 & 25 Vict. c. 96, § 24.

time appointed by the convicting Justice, the offender may be committed to the House of Correction with or without hard labour for a term not exceeding two months, if the aggregate penalty and sum forfeited do not exceed 5*l.*[1] If it is a first offence, the Justice may discharge the offender altogether on the latter making satisfaction to the party aggrieved for damages and costs as ascertained by the Justice;[2] and a conviction is a bar to any other proceeding for the same offence.[3] The convicted party may either appeal against his conviction to the next quarter Sessions, on giving notice to the other party within three days after the decision,[4] or he may appeal to one of the superior courts of law directly.[5]

When Anglers may be Apprehended.—Though an angler were found poaching, the common law gave no summary remedy against this offence. He could not be seized and given into custody by the owner of the land or of the fishery, nor could a Justice of the Peace fine him for the trespass. All that could be done was, for the owner to order the angler to quit the land, and if he refused, to push him off with as little violence as possible; and the owner could then soothe his feelings by bringing an action against the angler, but this was a tedious and costly remedy, which often ended unsatisfactorily, if not disastrously, to the plaintiff.[6] The Larceny Act has not

[1] 24 & 25 Vict. c. 96, § 107, *ante* p. .
[2] Ibid, § 108, *ante* p. .
[3] § 109, *ante* p. .
[4] § 110, *ante*, p. .
[5] See *ante*, p. .
[6] See Paterson's Game Laws, p. 45; Introd. 34, 36.

amended the law in this respect, and has given a power to apprehend the angler only in rare cases. If the angler is found on the spot, committing either of the offences already mentioned, he may be apprehended by any person without a warrant and taken before a neighbouring Justice. But if the angling takes place, as will probably be generally the case, in the *daytime*, he cannot be so apprehended by any person whatever, whether the owner of the fishery or not, for the statute excepts him in express words.[1] Daytime is defined by the Act to mean the "time between the beginning of the last hour before runrise and the expiration of the last hour after sunset."[2] So that the angler, though wilfully poaching, provided he do so in the daytime, is saved the indignity of being seized and dragged before a neighbouring Justice and committed to prison. He does not, however, escape the punishment, for he can be served with a summons to attend before the Justices on a future day, and if he refuse to attend, he may then be apprehended and brought by force.

Anglers' Rod and Tackle, when Seizable.—But though an angler in the daytime cannot be appehended by any person whatever, his fishing-rod and tackle may be seized by the owner of the ground or of the fishery in certain circumstances.[3] The persons who can so seize the tackle are stated by the statute to be "the owner of the ground or of the fishery." These words must, according to the general rule of construing penal enactments, be strictly

[1] 24 & 25 Vict. c. 96, § 103, *ante* p.
[2] 24 & 25 Vict. c. 96.
[3] 24 & 25 Vict. c. 96, § 25.

construed. Therefore, if the ground or fishery is let, the occupier would not be entitled to seize, for no power is given to the occupier. Moreover, the angler's tackle can only be seized if he is at the time offending, and on the spot where he has been fishing. Hence, if he has gone away, or escaped into another person's ground or into the highway ,before the owner has overtaken him (which will probably be frequently the case), the power to seize is gone. In that case he can be served with a summons, and made to answer before a Justice of the Peace for the offence. Moreover, it is only the tackle or implements used for fishing that can be seized, which would include rod, line, and hooks, and a gaff, if used as an auxiliary to angling, but not the basket or bag.[1] Moreover, if the owner of the fishery seize any of the angler's implements he is precluded from taking any other remedy, whether civil or criminal.[2] So that while the angler is exempt from arrest in person, yet his tackle and rod may be seized in certain cases, but if this latter remedy is resorted to, it operates as entire satisfaction, and no other proceeding is competent. The person who legally seizes the rod and tackle acquires the property in them, and can sell or burn them.

Remedies against Angler Poaching.—When an angler trespasses on the banks of a private stream, or in a several fishery, he may, as already stated, in some, though in rare cases, be apprehended, and taken before a Justice of the Peace and convicted.[3] If, however, in

[1] See *post*, p. .
[2] 24 & 25 Vict. c. 96, § 25.
[3] See *ante*, .

the circumstances he cannot be apprehended, he is nevertheless a trespasser on the land adjacent, and the owner or occupier of the land may, as already mentioned, push him off, using no more force than is necessary for that purpose. The angler may also be served with a summons, charging him with the offence of illegally fishing in the private fishery, and may be fined to the extent previously mentioned. If the angler is convicted, he cannot be punished in any way by another proceeding; but if this criminal remedy is not resorted to, the angler may be sued in an action at law for the trespass on the lands, or water if it is a several fishery, or an action on the case for disturbing the fishery, if it is a free fishery or a common of fishery.

Claim of Right to Angle.—It will no doubt sometimes happen that the angler will set up a legal right to angle in a particular place, and in such a case he will of course make that his defence if summoned before Justices or sued at law. When before Justices, if he set up a legal right in his own person to angle, he must be prepared to give some colour to his assertion by showing some reasonable ground for his claim. It is for the Justices to decide whether there is such reasonable ground, and whether the defendant *bonâ fide* relies on it,[1] in which case the Justices will stay their hands, and remit the parties to settle the point by means of an action at law.[2] If, however, the claim of right is mere empty assertion, without colour of foundation in point of law, the Justices will disregard it, and convict the party, if there is evidence of the offence.

[1] See *ante*, p. .

[2] See *ante*, p. .

It may also be observed, that if a party claim the legal right to angle, and in exercise of his right trample on corn, break overhanging branches, leap fences, and do other acts which would otherwise be injurious to the land or crops of the owner or tenant of the lands, he cannot be punished under the Malicious Trespass Act, 24 & 25 Vict. c. 97; for such acts done in exercise of a right are expressly exempted.[1]

Claims of Inhabitants of Towns to Angle.—Sometimes the inhabitants of a village or town set up a claim to angle in a part of a river or water on the ground of ancient custom. If, however, the fishery is a several fishery, whether in the sea or river, which means that the exclusive right of fishing there belongs to some individual, such a claim on the part of the public is difficult to be established. In many cases the owner of a several fishery may consider the rod fishing of little or no consequence, and may expressly grant permission, or impliedly tolerate anglers without caring to disturb them, so long as they did not interfere with the more valuable part of the fishery, viz. the fishing with nets. In such cases the acts of persons anglers are more likely to be referable to the licence of the owner, who, if he pleases, may allow all the public or a portion of the public to angle there. But no length of time during which such acts are capable of being explained on the ground of licence, can prevent the owner putting an end to such licence. He may resume his original rights at any moment, and withdraw the licence, for no man

[1] See *ante*, p.

ought to have his rights abridged by acting liberally towards the public or his neighbours.

On the other hand, as it is quite competent for the owner of a fishery to split up his rights of fishery into rod fishing and net fishing, it might be said that there is nothing in point of law to prevent him dedicating the rod fishing to the public and retaining the net fishing. If for many years he has allowed the public to angle without ever interrupting them, there is no reason why a presumption of law will not arise that he has dedicated the angling to the public; and, as in the analogous case of highway, there is no definite number of years required in order to give rise to such presumption being raised against him. Hence it may happen that after a number of years user by the public promiscuously of the angling in a particular water or river, the public may begin to claim as a right what at first was merely a licence, and litigation may arise as to whether the public have acquired the right or not. There seems, however, no trace of any such right being established in this way. *Primâ facie,* if there is a several fishery there, the right of angling also being a part of the several fishery, will belong to the owner of the several fishery; and if all the acts of the public can be readily explained by the theory of express licence on the part of the owner, the public will have acquired no right as against him. But if no case of interruption on his part can be proved for a series of years, then dedication may be presumed against him; and the claim, if made at all, must be set up on the ground of dedication to the public at large, for a mere

custom of the inhabitants of a vill to angle cannot be sustained.[1] In these cases of disputed right, the only course of the owner of the several fishery is to sue one of the public for trespass, and thus raise the question; and if he succeed at law, he may then resort to a Court of Equity for a decree in a bill of peace to quiet his possession by an injunction.[2]

It is of little use in such cases of disputed right for the owner of the fishery to proceed against persons before Justices of the Peace in order to convict them summarily; for as soon as a claim of right is set up by the defendant, the Justices have no jurisdiction to decide the matter in dispute.[3]

Right to the Fish Angled.—Though the angler who angles without the leave of the owner of the fishery is a trespasser and a poacher, and incurs the penalties before mentioned, yet he is entitled to keep the fish he has illegally caught. The reason of this is, that the fish were wild animals, and belonged to nobody before they were caught; they only became articles of property when they were caught, and according to the general rule applicable to all wild animals, he who first catches them is entitled to the property in them. They become absolutely his, and the owner of the fishery, as it seems, cannot even sue him in a civil action for their value,[4]

[1] *Bland* v. *Lipscombe*, 4 E. & B. 713 *n*; *Lloyd* v. *Jones*, 6 C. B. 89; Gateward's case, 6 Rep. 60.

[2] *Ashworth* v. *Brown*, 10 Ir. Ch. R. 421; *Allen* v. *Donelly*, 5 Ir. Ch. R. 229; *Mayor of York* v. *Pilkington*, 1 Atk. 282; *City of London* v. *Perkins*, 3 Bro. P. C. 602.

[3] See *ante*, p. .

[4] See *ante*, p. .

though, as will be seen, he may bring an action on the case, or an action of trespass, according to the nature of his own right of fishery, in which action he will recover the value of the fish as part of the damages.

Purchase or Lease of Rod Fishing.—It has already been stated that he who has the several fishery in a particular stream or water, *i.e.* who is entitled exclusively to catch every kind of fish which frequent such water, can separate or subdivide the entire right into parts, and let each kind of fishing separately. Thus he may let the oyster fishery to one person;[1] he may let the salmon and trout fishing by nets to another; and he may let the rod and line fishing to a third.[1] The only effectual way of assigning the rod and line fishing to a third party, or, in popular phrase, of selling it, and parting with it for ever, is to execute a deed under seal, for a fishery is an incorporeal hereditament, and can only pass by deed.[3] Any gratuitous leave not by way of deed confers only a licence to fish, which is revocable at any moment.[4] A contract of letting, or a lease for the consideration of a certain rent, may, however, be entered into without a deed, and the landlord or lessor can recover his rent under an *indebitatus* count for use and occupation.[5]

[1] *Seymour* v. *L. Courtenay*, 5 Burr. 2814; *Rogers* v. *Allen*, 1 Camp. 309.

[2] *Holford* v. *Pritchard*, 3 Exch. 793.

[3] *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875; *Bird* v. *Higgenson*, 2 A. & E. 696.

Per Parke, B. *Holford* v. *Bailey*, 13 Q. B. 426; *Hopkins* v. *Robinson*, 2 Lev. 2.

[5] *Holford* v. *Prichard*, 3 Exch. 793; *Bird* v. *Higgenson*, 2 A. & E. 696.

When the rod and line fishery is let by the owner of the fishery, the limited use of the banks goes with the fishery, for otherwise the exercise of the right of fishery would be unavailable; but this right is limited to the purposes of the fishery only, and extends to no other use.[1]

It may be observed that, as between the landlord and the tenant of lands in which a stream or water exists, if the fishery is not reserved by the landlord, it will belong o the tenant, in the same way as the right to game belongs to the tenant at common law.[2] A fishery is, in truth, merely one of the uses of water; and as a lease is a contract for the exclusive use and possession of the surface of the land, it follows that the fishery will be the tenant's if not expressly excepted by the landlord.

Angling Salmon.—The rules already mentioned apply to angling salmon as well as other fish, for at common law no distinction exists between the two, nor does the Larceny Act draw any distinction. But the Salmon Fishery Act, though not altering the general rules of law as regards the right of fishing for salmon as well as other fish, introduces some peculiarities in regard to that fish which form the subject of the next chapter, and, among others qualifies, the rights of anglers of salmon. In all other respects, therefore, the law of angling salmon is the same as that of angling other fish, except as regards the following points, which only affect other fish to a limited extent.

By the Salmon Fishery Act, any person who uses

[1] 1 Wms. Saund. 323 *n* (6).
[2] Paterson's Game Laws.

salmon-roe for purposes of fishing any fish whatever, incurs a penalty of 2*l.* for each offence.[1] Though it is illegal for other persons to use a gaff for catching salmon, yet it may be lawfully used as auxiliary to angling with a rod and line.[2] An angler is not liable to a penalty like other fishermen, if he angle for salmon in the head race or tail race of any mill, or within fifty yards below any dam where such mill or dam has no legal fish-pass attached.[3] An angler is not, however, exempt for taking unclean or unseasonable salmon and the young of salmon,[4] and he forfeits his rod and line besides when committing this offence.[5] He is also prohibited from angling for salmon during close time, except that he is privileged to fish two months longer than those who fish with other means. The angler's close season for salmon extends from 1st November to 1st February following; whereas for other fishermen the close season is from 1st September to 1st February, unless the local season has been altered:[6] but, strange to say, he cannot sell the fish so caught by angling in the months of September and October, though he may make presents of them.[7] The angler is also privileged as regards the weekly close time, viz. from 12 o'clock noon on Saturday to 6 A.M. on Monday morning, all the

[1] 24 & 25 Vict. c. 109, § 9. See *post.*
[2] Ibid, § 8.
[3] 24 & 25 Vict. c. 109, § 12.
[4] 24 & 25 Vict. c. 109, §§ 14, 15.
[5] Ibid,
[6] 24 & 25 Vict. c. 109, § 17.
[7] 24 & 25 Vict. c. 109, § 19.

year round, for if otherwise entitled he incurs no penalty for angling during that interval.[1]

It is scarcely necessary to observe that the close season applies only to salmon, for as to all other fresh-water fish there is no close season, and therefore they may be fished all the year round.

It is also important to observe that no power is given by the Salmon Fishery Act to apprehend persons committing the above offences. The ordinary procedure is to issue a summons to the party, convening him before Justices of the Peace where the offence was committed.[2]

[1] 24 & 25 Vict. c. 109, § 21.

[2] The procedure is under Jervis's Act, 11 & 12 Vict. c. 43; 24 & 25 Vict. c. 109, § 35. As to penalties, &c. see next chapter.

CHAP. VIII.

LAWS AFFECTING SALMON FISHERIES.

SALMON LAWS GENERALLY—POISONING SALMON RIVERS—LEGALIZED NUISANCES WHICH POISON RIVERS—FISHING SALMON WITH LIGHTS, SPEARS, ETC.—USING FISH-ROE AS BAIT—SALMON NETS—FIXED ENGINES—FISHING DAMS—GRATINGS IN ARTIFICIAL STREAMS—TAKING UNCLEAN FISH—TAKING YOUNG OF SALMON—DISTURBING SALMON SPAWNING—CLOSE TIME—HOME OFFICE VARYING CLOSE TIME—SELLING FISH DURING CLOSE TIME—EXPORTING SALMON DURING CLOSE TIME—FIXED ENGINES IN CLOSE TIME—WEEKLY CLOSE TIME—REGULATIONS AS TO FISH-PASSES—REGULATIONS AS TO FISHING-WEARS—CENTRAL AUTHORITY OF HOME OFFICE—CONSERVATORS OF SALMON-WATERS—JUSTICES GRANTING SEARCH-WARRANTS—APPREHENDING OFFENDERS—PROCEDURE AND PENALTIES.

Salmon Laws Generally.—The statute laws relating to salmon have recently been revised and consolidated by the Salmon Fishery Act, 24 & 25 Vict. c. 109.[1] At common law there is no difference between salmon and other fish, but owing to the supposed importance of this fish as an article of food, it has been singled out for protection by the legislature. Nevertheless, the statute contains only a part of the entire laws governing the subject, and does not deal with the ordinary offence of

[1] The statute is printed in the Appendix.

poaching salmon. It either supplies deficiencies in the common law, or varies the common law, and as a general rule, the statute introduces peculiarities in the law as to salmon which are not applicable to other fish. The chief object of the statute is to prevent owners of fisheries from doing what they like with their own, that is, it prevents them from killing salmon at certain times, and by certain kinds of means, in order to secure fair play to the fish and to the adjoining owners, and with a view to the public interest. It may be safely assumed that the law, as previously stated. applies equally to salmon as to other fish, except so far as varied by what follows in this statute. The statute repeals nearly all local acts, all the previous acts as to salmon, and others also.[1] The Tweed and Solway are governed by separate statutes.

Poisoning Salmon Rivers.—The statute (section 5), imposes fines on persons poisoning salmon rivers, but exempts those who claim a legal right so to do, in which case all that they require to do their best to use the best reasonable means to neutralize the poison they send into the river.[2] The section *primâ facie* subjects to a penalty all who knowingly put poisonous matter into waters "containing salmon, or any tributaries thereof." Therefore the waters include the sea, mouths of rivers, and even tributaries where no salmon may be usually found. The test of poisoning is one of quantity, and of course the quantity of matter must be greater to poison fish in a large river than in a small stream. But it is not necessary that the fish be actually

[1] See *ante*, p. . .

[2] See other enactments as to fouling rivers, *ante*, p. .

killed, if the quantity was reasonably calculated to kill fish which at the time might be there.[1]

If any fish whatever are killed, whether salmon or not, this is conclusive evidence of the killing power of the quantity put in the stream. The word tributary, however, must be reasonably construed, so as to mean merely that part of the tributary stream which immediately adjoins the salmon water, otherwise it would include all streams whatever, for all streams are tributaries, in one sense, of a salmon water. The tributary need not contain salmon in order to be protected. In order to constitute the offence, it is not necessary to prove any malice in the defendant, or intent to kill or poison the fish, malicious offences being provided for by another enactment of the Malicious Injuries Act, 24 & 25 Vict. c. 97, § 32;[2] but it must be proved that the defendant either personally put in, or ordered the matter to be put into the water, whatever may have been his motive, provided he had otherwise no legal right to act; as to which, see *post*. If a servant did the act without the master's knowledge or interference, the servant and not the master is liable to the penalty.[3] It is not necessary that there should be a several fishery in the water poisoned; it is enough that salmon frequent the water which is poisoned.

The words "permit to flow," are extensive in their meaning, and in effect make the person an insurer that

[1] See *R.* v. *Bradford*, 24 J. P. 374, where analogous words were so construed.

[2] *Ante*, p. .

[3] *Harrison* v. *Leaper*, 26 J. P. 373.

the poisonous matter shall not flow into the water. This is at least the case where a manufacture is permitted, and a similar clause to the above is inserted, and hence it is no defence that the party used great care, and was not actually aware of the specific cause of the matter flowing.[1] But Cockburn, C. J. doubted whether an individual can be said to suffer or permit a thing to be done, when he has taken every care to prevent it, or until an opportunity has been afforded him to repair the injury.[2]

Legalized Nuisances which Poison Rivers.—The fifth section expressly saves the rights of persons who act *bona fide* in putting offensive matter into rivers and streams in the exercise of a legal right to do so. Hence it is necessary to consider in what circumstances, and to what extent this *primâ facie* nuisance may become legalized.

The common law gives no right to any person to pour offensive matter into streams so as to prejudice the rights of those living nearer the sea. The mere fact of a person having land adjacent to a stream, gives only the right to that person to use the water for ordinary purposes; for example, for household use, or for cattle, or irrigation : but a riparian proprietor has no right to diminish the volume of water to an injurious extent, or to alter its plight or volume.[3] The lower proprietor is entitled to have the use of the same volume and plight of water, as near as may be, as the

[1] *Hipkins* v. *Birmingham Gas Co.* 6 H. & N. 250.
[2] Ibid, 255.
[3] *Miner* v. *Gilman*, 12 Moore, P. C. 131.

upper proprietor had, and if this right of the lower proprietor is injuriously affected by what the upper proprietor has done, the latter is liable to an action on the case; a familiar illustration of this right being that of a mill owner suing an upper proprietor for diverting or abstracting the water to a sensible and injurious extent. This right of the lower proprietor to have the stream sent down to him in a pure state, is, however obviously one of degree, for it cannot be said that a riparian proprietor who merely drains into a large river, is liable to an action at the suit of a lower proprietor.[1] The degree and extent of the pollution must be considered relatively to the size of the river, and no doubt draining into a stream is not an unreasonable use of a stream at common law, being, indeed, a natural operation, which would be less of a nuisance than allowing the matter to dispose of itself by exposure to the air. If, however, an upper proprietor has been allowed without disturbance or objection to drain offensive liquid, or put matter into a stream for a period of twenty or forty years, he is said to have acquired a prescriptive right to do so for ever thereafter.[2] This fifth section, therefore, does not interfere with or annihilate such a right; all it does is to require him to prove that he has used the best practicable means within a reasonable cost to render harmless the liquid or solid matter so permitted to flow or to be put into the water. In order to show that the unusual and unlawful use made by one riparian owner

[1] *Embrey* v. *Owen*, 6 Exch. 372.

[2] *Bealey* v. *Shaw*, 6 East. 214; *Wright* v. *Williams*, 1 M. & W. 77; *Carlyon* v. *Lovering*, 1 H. & N. 789.

has not been acquiesced in, proof may be given that an action had been brought and a verdict obtained against the party fouling the water, or that he was convicted.[1]

When a riparian owner has long used without interruption the stream in a way which is not justified by his natural right, a presumption arises that he has obtained a grant from the riparian owners beneath him.[2] This grant is seldom capable of direct proof, but uninterrupted user for forty years is conclusive proof of it, or at least gives the party enjoying it after that time an absolute and indefeasible right so to use the water in the same way for ever after, unless it shall appear the same was enjoyed by some consent or agreement, by deed or writing.[3] And even after twenty years uninterrupted user, the claim to continue so to use it is not defeated by merely proving that it was first so used at some time prior to such twenty years.[4] The twenty years begin to count only from the time when sensible injury accrued to the one party from the excessive user of the other party.[5] The enjoyment of the right of polluting a stream thus amounts to an inchoate title, and must continue uninterrupted up to the commencement of the suit.[6]

If the party polluting a river has no legal title as above explained, then he is liable to an action at law by

[1] *Eaton* v. *Swansea Water Co.* 17 Q. B. 267.

[2] *Sampson* v. *Hoddinot*, 1 C. B. N.S. 612; *Murgatroyd* v. *Robinson*, 7 E. & B. 391.

[3] 2 & 3 Wm. IV. c. 71, § 2.

[4] Ibid.

[5] *Murgatroyd* v. *Robinson*, 7 E. & B. 391.

[6] *Ward* v. *Robins*, 15 M. & W. 242; *Battishill* v. *Read*, 18 C. B. 705; *Parker* v. *Mitchell*, 11 A. & E. 788.

the parties injured, and in the action an injunction may also be claimed.[1] But the most effectual remedy in the first instance will be a proceeding before Justices under this statute, when, if necessary, an action may be brought.

If the fishery is injured by matter being poured into the water, and the injury is not accidental, but likely to continue, the owner of the fishery may apply to the Court of Chancery for an injunction to restrain the proceeding. Thus, where the plaintiff was owner of a trout fishery in the river Wandle, and the Local Board of Health carried on extensive operations in deodorising the sewage of Croydon, but did it so unskilfully as to permit poisonous matter to flow into the river, and so to kill the fish, the Court granted an injunction.[2] A Court of Common Law may also grant an injunction, as subsidiary to an action of damages, in all cases where a Court of Equity would grant an absolute injunction.

Stopping Illegal Rights.—Though if the owners of the fisheries object and interrupt any riparian owner in the attempt to acquire a legal right to poison the stream they will thus prevent him from acquiring it, yet if they remain quiescent for twenty years, and submit to the nuisance, they will be barred in future in like manner from afterwards disputing the right. The Act (section fifth, last clause) makes no difference in this respect, so that it will always rest on the owners of fisheries themselves to prevent such a prejudicial right

[1] *Stockport Water Co.* v. *Potter*, 7 H. & N. 160. Coke says an action lies for any special damage to a several fishery, as by erecting a dye-house, or other nuisance, 9 Rep. 59.

[2] *Bidder* v. *Local Board of Health of Croydon*, 6 L.T. N.S. 778.

being acquired and rendered indefeasible at their expense.

Who may Prosecute.—Any person whatever, whether interested or not, may institute proceedings for recovery of the penalties for poisoning rivers, as well as for other offences in the Salmon Fishery Act. The prosecutor is entitled to a portion of the penalty, not exceeding half.[1]

Claim of Right to Poison a River.—When a person is summoned before Justices for the offence of poisoning a salmon water, it is not enough to oust the jurisdiction of Justices that the defendant asserts that he has a legal right to poison the stream. He must give some *primâ facie* evidence to the Justices, so as to satisfy them that there is some foundation for the claim, such, for example, as his having done so for twenty years openly. If the Justices erroneously conclude that he has no legal right, and convict him, they are nevertheless not liable to an action, unless malice is alleged, and unless it is proved that there was no evidence before the justices which could have led them so to find that the claim was unfounded.[2]

In order to entitle the defendant to have the matter determined by a Court of Law, instead of by Justices, he must comply with the requisites stated in section sixth, viz. prove that he had done his best, and that it would cost above 100*l.* to remedy the matter. The Justices must be satisfied that the costs of preventing the nuisance will exceed 100*l.* and slight evidence of this

[1] 24 & 25 Vict. c. 109, § 35, *post.*
[2] *Pease* v. *Clayton*, 27 J. P. 309.

should be accepted, for the full proof must be reserved for the jury afterwards. If the defendant comply with what is required in the beginning of section sixth, the Justices have no option as to staying the proceedings. A stay of proceedings then occurs as a matter of course. And they have no power to deal with costs, as these form part of the costs of the action. It is not, however, compulsory on the complainant to proceed by action. If he does, he can choose his own superior court. He merely issues a summons. The question of fact will be settled by consent, or otherwise, by a Judge at chambers, according to the practice under the Common Law Procedure Act, 1852, § 42, *et seq.* It is obviously intended that the jury should answer yes or no, there being no question of damages. The Justices will settle what security should be given by the defendant, which ought to be sufficient to cover the penalty and costs in the event of his losing the verdict (section seven). If the defendant do not defend, judgment will be entered up by default. If nothing is agreed as to costs, the costs shall follow the event.[1] The decision of the jury is conclusive as to the question involved, viz. whether it would cost 100*l.* to stop the nuisance.

Fishing Salmon with Lights, Spears, &c.—No person, whether the owner of a salmon fishery, or a trespasser, is permitted to fish with lights, spears, gaffs, stroke-balls, snatches, or the like instruments, or even to have such things in his possession, with intent to catch salmon.[2] The offence, therefore, is not merely actually

[1] C. L. P. Act, 1852, § 48.
[2] 24 & 25 Vict. c. 109, § 8.

using lights or spears for catching salmon, but having in one's possession these articles with intention to use them. This latter offence is one which gives a wide discretion to Justices, but they must be governed by reasonable considerations. The mere possession of the articles of themselves is not illegal; the intent makes all the difference. The question, therefore, will be one of circumstantial evidence as to the character of the party possessing them, the account he gives, the time and place when he is found in such possession, &c. The Justices must have circumstances before them from which they can reasonably infer the intent to use them at the time, which means also not a future, but a present time. A person might even be found guilty who was found in his house with these implements, preparing to start, provided he intended forthwith to use them illegally. Possession of an illegal kind always implies that the party knew of the things, for an unconscious possession is not a guilty possession.[1] These offences can only be committed with respect to salmon, and no other fish, for at common law one can catch fish by any means he thinks proper. The instruments are forfeited, *i.e.* the Court can destroy them or sell them, and apply the proceeds in the same way as the penalty.[2]

Using Fish-roe as Bait.—It is a criminal offence for any fisher, whether the owner of a fishery or a poacher, to use fish-roe for fishing, or to buy, or sell, or have salmon-roe in one's possession.[3] The first offence applies

[1] Per Alderson, B. in *R.* v. *Woodrow*, 15 M. & W. 404; *R.* v. *Sleap*, 1 L. & C.

[2] See *post*, 24 & 25 Vict. c. 109, § 35. [3] 24 & 25 Vict. c. 109, § 9.

Duplicate

to fish-roe used for fishing; the second offence to salmon-roe. The word fish not being defined by the statute, the obvious meaning of the first clause is that the roe of any fish whatever, is not to be used for the catching of any fish whatever, so that other fish than salmon are here protected. The only offence as to the roe of other than salmon-fish, is the using it for fishing, and therefore it is no offence to buy or sell it, or to use it for other purposes than fishing. But as to salmon-roe the statute is more strict, and not only the buying, selling, or exposing to sale, but the possessing of it for any purpose whatever is an offence, the possession being a possession with knowledge. Scientific and other legitimate purposes are expressly excepted. The penalty is incurred for each offence. The rule is, that only one offence can be committed on one day, if there is merely a repetition of acts of the same kind, as for example, using fish-roef or fishing the whole day long, would be only one offence.[1] But buying salmon-roe, or selling it or exposing it for sale, or possessing it, is each a distinct offence, and may be separately punished, unless it is the same identical salmon-roe which is the subject-matter of each transaction. If a person were to buy some salmon-roe, offer to sell some to *A*, then sell some to *B*, and keep the rest, he may be guilty of four offences on one day.

Salmon Nets.—No person, whether the owner of a fishery, or a poacher, is entitled to fish salmon with a net less than two inches from knot to knot, otherwise he forfeits the nets and incurs a penalty of 5*l.*[2] The

[1] *R.* v. *Lovett*, 7 T. R. 152; *R.* v. *Scott*, 27 J. P.
[2] 24 & 25 Vict. c. 109, § 10.

offence consists either in taking, or attempting to take salmon with illegal nets. The nets and tackle become forfeited provided a conviction take place, and then may be disposed of as stated by sect. 35. No offence under this section is committed by a person who has in his possession a net of the illegal size, provided it is not used in taking or attempting to take the fish. But a search-warrant may be obtained to seize them under sect. 34, if there is reasonable evidence that there is probable cause to suspect they have been used illegally.

Fixed Engines.—It is an offence to use fixed engines of any description in any waters for the purpose of catching salmon.[1] The engine is forfeited as well as the salmon caught, and a penalty of 10*l.* a day is incurred besides. This section has nothing to do with fishing wears or fishing mill-dams, which are dealt with in the twelfth section.[2] All possible waters which salmon frequent are comprehended in the phrase inland or tidal waters. Fixed engines, by the interpretation clause, § 4, include stake-nets, bag-nets, pults, pulchers, and all fixed implements or engines for catching or for facilitating the catching of fish. Where there is no several fishery, but the public generally are entitled to fish, they are prohibited by this section from using fixed engines, whether they have been accustomed to do so from time immemorial or not. The section confers a power on any one of the public, whether interested or not, to destroy a fixed engine, and therefore he is not liable to

[1] 24 & 25 Vict. c. 109, § 11.
[2] *Moulton* v. *Wilby*, 8 L. T. 234.

an action for trespass for doing so. As to the forfeiture, see *post*, 24 & 25 Vict. c. 109, § 35.

As already explained, not only wears but any fixed engine which sensibly prevents the passage of fish to the upper streams, are illegal at common law; but on the construction of the statutes affecting wears, it is now settled that wherever the engine or fixed apparatus can be traced to the period of Magna Charta they are legal.[2] Hence all owners in this position are expressly exempted from this penalty.

Fishing Dams.—No fishing mill-dam or fishing wear is legal except it be ancient, and even ancient fishing wears must have a free gap, and ancient fishing mill-dams must have a proper fish-pass; and no fishing is allowed in the head or tail race of a mill, or within fifty yards below a dam, unless these have a fish-pass.[3]

As already stated, no wear or dam for fishing is legal unless its origin can be presumed to be older than Magna Charta.[4] This section makes illegal all other wears, and renders it necessary to have fish-gaps and passes attached to those which are legal. Only one offence can be committed on one day, whether any salmon be caught or not; but the penalty of 1*l.* per salmon actually caught is over and above the 5*l.* incurred for the substantive offence.[5] As to the disposal of the forfeited traps, nets, and salmon, see *post*, 24 & 25 Vict. c. 109, § 35.

[1] *Williams* v. *Blackwall*, 8 L. T. N.S. 252.
[2] See *ante*, p. .
[3] 24 & 25 Vict. c. 109, § 12.
[4] See *ante*, p. .
[5] See *R.* v. *Scott*, 27 J. P.

Dams, though not ancient, are not made illegal by this section merely because they have no fish-gap or pass, provided they are not used for catching salmon; and therefore they may also be legally used for catching other fish, provided they are not illegal at common law. They are illegal at common law if they sensibly impede the fish from passing up the stream to other proprietors. The fish-pass for an ancient fishing dam must not only be approved by the Home-Office, but must have a flow of water constantly moving through it, so as to let the salmon pass up and down.

The second heading of this section applies to dams which are not fishing dams and to mill-races, and contains an absolute prohibition against catching salmon at the places mentioned in any manner, except by rod and line, unless there is a regular fish-pass attached; and even if the owner of the mill-dam refuse his consent to the attaching of a fish-pass, the owner of the fishery will nevertheless be prohibited from so fishing. Thus where the owner of a fishery had a salmon cage built upon a spur of masonry, beside a wear or a dam which had no fish-pass, but it belonged to another person, and he took salmon out of the cage with a hand net, he was held rightly convicted, though he could not compel the owner of the dam to attach a fish pass;[1] and it seems his proper course would be to apply to the Home-Office to order a fish-pass to be attached to the dam.[2]

A difficulty may arise where the fishery belongs to one person and the wear to another, in saying that the

[1] *Moulton* v. *Willy*, 8 L. T. N. S. 284.
[2] Per Martin, B. ibid.

wear is used for catching fish; but it seems to come within that description.[1] The section has thus the effect of taking away from the owner of a fishery valuable property without compensation, for it prohibits him from using his fishery in the same way that he has used it from time immemorial.[2]

Gratings in Artificial Streams.—Where a salmon stream communicates with a canal or artificial channel used to supply towns with water, a grating must be put across such channel to prevent the salmon or young salmon passing.[3] If the grating has not been put up and maintained, as required by this enactment, a civil remedy also exists against the company or persons, and the owner of an adjacent fishery who is injured by the neglect of duty may bring an action on the case. This enactment is obviously intended only to apply to channels where the water of the salmon river descends or runs out, and not to channels from which the water descends into the salmon river.[4]

Taking Unclean Fish.—No person, whether the owner of a fishery or not, is allowed to take, buy, or sell or possess unclean or unseasonable salmon, excepting accidents and scientific purposes.[5] The offence of wilfully taking unclean salmon implies knowledge of the condition of the salmon; but if accidentally taken, they should be returned to the water. "To take," means to acquire manual possession of or dominion over the fish.

[1] Per Bramwell, B. *Moulton* v. *Willy*, 8 L. T. N.S. 285.
[2] Per Bramwell, B. ibid.
[3] 24 & 25 Vict. c. 109, § 13.
[4] See *post*, § 15.
[5] 24 & 25 Vict. c. 109, § 14.

The buying seems to be one offence, selling another, &c. even though in reference to one and the same individual fish, and the penalty attaches upon each fish bought, &c.; thus cumulative offences may attach to one fish. The expression "forfeit" is properly applicable only to fish in one's possession, and hence has no meaning in reference to fish already sold, and which have been delivered to the buyer; in short, one can only forfeit what he buys but not what he sells. Though, therefore, the possessing is subject to a penalty, the property of the salmon is so far his that it would be larceny in a third party to take it from him.

No penalty is put upon each fish bought, the word "bought" being probably by oversight omitted, and therefore he who buys such a salmon merely forfeits it, but incurs no penalty.

Taking Young of Salmon.—It is an offence to take, destroy, buy, sell, or possess, obstruct or injure the young of salmon, or disturb a spawning bed.[1] There is no definite age implied in the expression "young of salmon," which is defined in sect. 4.[2] This is, however, now the only enactment protecting the young of fish, the older statutes being repealed by this Act,[3] and therefore at common law any person may take the young of other fish without restriction. The third offence, "placing a device obstructing the passage," is difficult of interpretation. It must mean a substantial obstruction, but the device need not extend to

[1] 24 & 25 Vict. c. 109, § 15.
[2] *Ante*, p. .
[3] § 30, *post*, p. .

the whole width of the stream, nor is there any restriction as to where the device is to be put. The object in view was probably to render illegal any gratings put across the tributary streams of salmon rivers, which would have the effect of obstructing the young salmon from going upwards. In order to convict of the third offence, it is not necessary to prove the actual obstruction, if in the ordinary course of things the device is calculated so to obstruct young of salmon of coming there. As to what is done with forfeited property, see *post*, § 35.

Disturbing Salmon Spawning.—The wilful disturbance or catching of salmon when spawning, or near their spawning beds, is punishable with a fine of 5*l.*; but catching salmon for scientific purposes is excepted.[1]

It might be a question how far persons legally entitled to fish trout, or any other freshwater fish, and doing so near spawning beds of salmon, would be within this penalty and other penalties of this Act; but it seems they would not. Trout fishing may be a much more valuable right than salmon fishing at the spot in question; and even if it were not, there is no trace in the law of England (as there is in the law of Scotland) of the doctrine that salmon fishing is a paramount right to which other freshwater fishing must yield. The word "wilfully" is the essence of the offence, and implies an absence of *bonâ fides*; but if the party were *bonâ fide* exercising his right of trout fishing, he seems not to be within this section of the statute.

Close Times.—The close time for salmon fishing is fixed by the statute, and it is illegal to fish salmon

[1] 24 & 25 Vict. c. 109, § 16.

between the 1st day of September and the 1st of February following, inclusive, or for anglers to fish between 1st of November and the 1st of February following, both inclusive.[1] The fish are forfeited, and the penalty increases with the number of fish caught. The offence consists in catching or killing during the close season, or attempting to do so; but it is no offence to keep, for purposes of food, the fish caught on the few last days of the fishing season for some days after the close season commences,[2] and a margin of three days more is given for buying or selling. See sect. 19. As there is no close time as to trout and other fish than salmon, it is possible that salmon might be caught accidentally during close time by those who are legally exercising their right of fishing for other fish, and in such case no offence would be committed.[3] But if the evidence showed that the fishermen were merely fishing colourably for trout, &c. and were in reality in pursuit of salmon, this defence will naturally be viewed with suspicion, and will require clear evidence. There can only be one offence committed under this section on one day, but the penalty will be increased according to the number of salmon actually caught.[4]

The anglers have an extension of the fishing season for two months, viz. September and October.

Home-Office varying Close Season.—Power is given to the Home-Office to vary the close season for salmon

[1] 24 & 25 Vict. c. 109, § 17.
[2] *Simpson* v. *Unwin*, 3 B. & Ad. 134.
[3] See *ante*, p. .
[4] See *R.* v. *Scott*, 27 J. P. 420.

fishing.[1] The Home-Office cannot interfere unless on the application of the Justices in Quarter Sessions, after the preliminary notices mentioned, and the Home-Office has a discretion to refuse to alter.[2] The phrase "extend or vary" is an inartificial expression. The proper meaning would be "extend or contract," the close season, otherwise the word "vary" would be insensible. Nevertheless, taking the whole of the section together, the context is such that the introduction of the words "or vary" is very clearly insensible; the rest of the clause uses the phrase, "the extension of such time," "close time so extended," showing that power was only given to the Home-Office to extend and not to shorten the close season. The section is also badly drawn, inasmuch as it leaves it uncertain whether the Home-Office, after once exercising the power to extend the close season, can only vary that extension on a like application of Justices; the section omits the words "on a like application of such Justices" in the last clause. Another defect in the section is, that no provision is made for suspending a copy of the Home Secretary's order in some public local situation, so as to be easily accessible to fishermen and anglers, as well as the local public, and thereby inform them of the change. But probably this power will seldom be exercised by the Home-Office at all, as uniformity of the law is always desirable.

Selling Fish during Close Time.—It is illegal to buy, sell, expose for sale, or possess salmon between 3d

[1] 24 & 25 Vict. c. 109, § 18.

[2] See *Re Newport Bridge*, 24 J. P. 133.

September and 2d February following.[1] As remarked,[2] there is no offence committed in keeping fish after close time has commenced for purposes of food; but this section makes it an offence to sell, or buy, or keep for such purposes between 3d September and 2d February following. As regards the computation of time, seeing that the statute does not say that the 3d September and 2d February are to be calculated as inclusive, those days must be reckoned as exclusive. Such is the result of the only authorities on this mode of construing a statute, especially where it is penal.[3] Hence it is legal to buy and sell salmon on the 3d September as well as on the 2d February.

It will be recollected that though it is legal for anglers to catch salmon in September and October, by sect. 17, yet it is by this clause illegal for the angler to sell or for the public to buy his fish. This may have been an oversight in the statute; but whether or not it was so, the angler will incur a penalty for making profit of his talents and skill during those two months. There is, however, nothing to prevent him making presents of angled salmon, or to prevent his friends thankfully receiving them, or even making gifts of other things in return.

The language is peculiar as to the imposition of the penalty, and differs from the other sections. Nevertheless the proper construction seems to be that a party

[1] 24 & 25 Vict. c. 109, § 19.

[2] *Ante*, p. .

[3] *Young* v. *Higgen*, 6 M. & W. 49; *Robinson* v. *Waddington*, 13 Q. B. 753. See analogous enactment, Paterson's Game Laws, 4.

can only commit one offence of the same kind, as buying, selling, &c. on one day, but that the penalty increases according to the number of salmon bought, sold, &c. As to forfeiture, see *post*, § 85.

A person who sells or buys during close time salmon which has been caught in foreign countries, or in Ireland or Scotland, commits no offence; but the *onus* is cast on him of proving that the salmon he sells, &c. was really caught out of England or Wales. For this purpose he must be prepared to produce the invoice, or other mercantile voucher, as evidence that they were purchased or obtained from abroad, and from whom.

Exporting Salmon during Close Time.—The offence of exporting salmon during close time was not included in the Salmon Fishery Act of 1861, but was dealt with by the Act 26 Vict. c. 10.[1] The latter Act makes exportation illegal, provided the fish were caught during close time. The Act contemplates that English-caught salmon may always be legally entered for exportation between 2d February and 3d September, inclusive; but exportation in England at other times is not illegal of salmon caught legally in Scotland or Ireland, for the Scotch and Irish close time do not coincide with the English close time.

Though anglers may, as already observed,[2] fish for salmon in England during September and October, they are liable to a penalty for selling them during those months; and as exportation is illegal wherever selling is illegal, it follows that they cannot export the salmon

[1] See Appendix.
[2] *Ante*, p. .

angled during those months. They are thus driven to consume them in person, or by the mouths of their friends and donees.

Fixed Engines in Close Time.—All proprietors of fixed engines must remove their apparatus of boxes, cribs, &c. within thirty-six hours after the commencement of close season, *i.e.* of 1st September, so as to allow the fish free course, otherwise the engines are forfeited, and 10*l.* per day is the penalty.[1]

The word fishery is not defined in the Act, but it means such a right as can be used, with the aid of certain machinery, where machinery is legal.[2] The section in effect renders illegal every kind of obstruction or temporary fixture of the nature indicated. Thus, where the owner of a mill-dam and of a fishery had certain locks in the dam which could be used for catching fish, and when down obstructed the fish, this was held an obstruction within this section.[3]

As to forfeiture, see *post*, sect. 35. Where the occupier is summoned, it is enough to prove that he acted *de facto* as the occupier. A fixed engine is defined by the Act, sect. 4, to include stake-nets, bag-nets, pults, pulchers, and all fixed implements or engines for catching or for facilitating the catching of fish.

Weekly Close Time.—Not only is an annual close time of five months prescribed; but during the open or fishing season, a space of nearly two days is given, *i.e.* from 12 noon on Saturday to 6 A.M. on Monday, for the fish

[1] 24 & 25 Vict. c. 109, § 20.
[2] See *ante*, p. .
[3] *Hodgson* v. *Little*, 8 L. T. N.S. 358.

to have a free run.[1] Hence no fishermen are allowed to fish for or catch fish during this weekly close time by any means whatever except by rod and line. The penalty is a forfeiture of the net or movable instrument used, and a penalty of 5*l.*, and 1*l.* per fish taken. Anglers are thus the only persons privileged to fish between Saturday noon and Monday morning, 6 A.M. They may lawfully fish on Sundays; though it is an offence punishable by a fine of 5*l.* to kill or pursue game on Sunday.[2]

The owners of pults or pulchers are not obliged to draw them up during weekly close time, but they must let down a net or other device so as to put them out of gear during those hours.[3]

And the owners of all fisheries where fixed engines are lawfully used, shall leave all his cribs, boxes, or cruives open during the weekly close time, under a penalty of 5*l.*, and 1*l.* per fish caught, besides forfeiting such fish.[4]

Regulations as to Fish-passes.—A dam is defined by the Act, sect. 4, to mean all wears and other fixed obstructions used for the purpose of damming up water. Wherever a dam legally existed at the time of the Salmon Fishery Act, the proprietor of a fishery may serve notice on the owner of the dam, that he intends to apply for the consent of the Home Office to affix a fish pass to such dam, stating the plan and specifica-

[1] 24 & 25 Vict. c. 109, § 21.
[2] Paterson's Game Laws, pp. 3, 4.
[3] § 21.
[4] 24 & 25 Vict. c. 109, § 22.

tions;[1] and the Home Office may hear both sides before deciding. It is absolutely requisite that the Home Office shall hear the objections of the owner of the dam before deciding, and the Court of Queen's Bench will grant a *mandamus*, if necessary, to the Secretary of State to hear the objections. The chief objection will be that the fish-pass will injure the milling power, but this will not be conclusive, for compensation may be recovered for such injury. The discretion of the Home Office in the matter of consenting to a fish-pass is absolute, and cannot be interfered with by a court of law, provided only the Home Secretary has fairly taken the objections into consideration. When a fish-pass is once authorized, penalties are imposed on all persons who interfere with the construction or maintenance of it.[2] The expense of erecting the fish-pass falls on the owner of the fishery.

In all dams made in salmon waters after 1861, or raised or altered after that date, which obstruct salmon, a fish-pass, of a form approved of by the Home Office, must be made at the expense of the person making or altering the dam.[3]

Whenever a legally constructed fish-pass is attached to a dam, the sluices must be kept shut (except when used for milling purposes, or in case of cleaning, or of a flood, or other necessary occasion), so as to allow the water to flow through the fish-pass, under a penalty of 5*s*. per hour.[4]

[1] 24 & 25 Vict. c. 109, §§ 23, 24.
[2] § 23. [3] § 25.
[4] 24 & 25 Vict. c. 109, § 26.

Regulations as to Fishing Wears.—A fishing wear is defined by the Act (sect. 4) a dam used for the exclusive purpose of catching, or facilitating the catching of fish. In all fishing wears which are legal (*i.e.* which have had a legal origin before Magna Charta,[1] and which at lowest water extend more than half-way across the stream), a free gap must be made of a size, and form, and situation prescribed by the statute, which can only be departed from by authority of the Home Office.[2] The owners of such a wear were bound within twelve months after 1st October, 1861, to make such a gap under a penalty of 5*l.* per day (sect. 28). The gap must be maintained under a penalty of 1*l.* per day;[3] and any alteration or obstruction, or contrivance to deter the fish from entering the gap, is punishable by a penalty of 5*l.* and upwards.[4]

The boxes and cribs used in fishing-wears or fishing mill-dams (*i.e.* a dam used partly for fishing and partly for milling purposes), must be of a certain situation, and the bars or inseals of the check or upstream side shall not be nearer each other than two inches, under a penalty of 5*l.* per day, and he must maintain the same under a penalty of 1*l.* per day.[5] Spurwalls, &c. more than twenty feet from the upper or lower side of the box or crib, are always prohibited, under a penalty of 1*l.* per day.[6]

Central Authority of Home Office.—The Home Office

[1] See *ante*, p .
[2] 24 & 25 Vict. c. 109, § 27.
[3] Ibid.
[4] Ibid.
[5] 24 & 25 Vict. c. 109, § 29.
[6] § 30.

is invested with the general superintendence of the salmon fisheries throughout England and Wales. It has power to appoint and remove from time to time two inspectors, and assign them duties and salaries.[1] The Home Office shall lay before Parliament the annual report of the inspectors.[2]

Conservators of Salmon Waters.—The Justices at any general or quarter Sessions, may appoint conservators or overseers to enforce the Salmon Fishery Act. No power, however, is given to these conservators to enter private grounds or waters, except where a search-warrant has been granted,[3] and therefore they have none. Their duty will be chiefly to act as detectives and prosecutors; and in truth a conservator or overseer has no greater powers than any one of the public would have, except that he may be employed to execute a search-warrant, as is described in the next clause.

Justices Granting Search-Warrants.—The power of a Justice of the Peace to grant a search-warrant, depends, as in other cases, on an information on oath, and the warrant must specifically describe the premises that are to be searched. It is scarcely necessary to observe that a search-warrant applies only to places and things, and does not authorize the apprehension of the person who committed the offence. The places are places where a breach of the Act has been committed, or where illegal nets or engines, or salmon illegally taken, are concealed. What are illegal engines, and what are salmon illegally caught, are described in the previous

[1] § 31. [2] § 32.
[3] See next clause.

sections of the Act. At common-law all the salmon caught by illegal means would belong to the person who caught them, and it is only where the statute expressly says that the salmon so caught shall be forfeited, that he loses this property in the salmon. Salmon illegally caught in this sense mean salmon caught by means of the illegal engines, and at the illegal times specified in the Salmon Fishery Act, but do not include salmon poached or caught by trespassers in a private fishery, as to which the poacher retains the property, for the Larceny Act does not say they are forfeited.[1]

Apprehending Offenders.—There is no power given by the Salmon Fishery Act to apprehend offenders, even where they are caught in the act; but the Larceny Act gives such power to any person to apprehend offenders under that Act, *i.e.* persons fishing in private fisheries without leave, if found offending.[2]

Procedure and Penalties.—All offences must be prosecuted within six months after the offence is committed.[3] The penalties are to be paid as follows: such part, not exceeding half, as the Justices may order, to the informer, the rest as provided by Jervis's Act, 11 & 12 Vict. c. 43. All forfeitures, *i.e.* all salmon illegally caught, illegal nets, &c. are to be sold as the Justices may direct, and the proceeds applied in the some way as the penalties.[4] Offences committed on

[1] See *ante*, p. .

[2] 24 & 25 Vict. c. 96, § 103, *ante*, p. .

[3] 24 & 25 Vict. c. 109, § 35, and the procedure is under Jervis's Act, 11 & 12 Vict. c. 43.

[4] 24 & 25 Vict. c. 109, § 35.

rivers dividing counties may be tried in either county.[1] Offences committed on the sea coast beyond the jurisdiction of Justices, may be punished by the Justices of the county adjoining such sea.[2] The ordinary jurisdiction of Justices extends to the shore between high and low water mark.[3]

[1] § 36. [2] § 37.
[3] *Embleton* v. *Brown*, 30 L. J. 136, Q. B.

SCOTLAND.

SCOTLAND.

CHAP. I.

FISHERIES IN THE SEA OTHER THAN SALMON.

OPEN SEA FISHERIES—TERRITORIAL SEAS AND NAVIGABLE RIVERS—CROWN'S RIGHT TO WHALES—OTHER FISH THAN SALMON—NAVIGATION PARAMOUNT TO FISHING—OYSTER FISHERIES—MUSSEL FISHERIES—HERRING FISHERIES—DEFINITION OF FISHERY.

Open Sea Fisheries.—The law of Scotland as to fishing in the open sea, as contradistinguished from the territorial sea, does not differ from the law of England, and the customs as to whale fishing are the same.[1]

Territorial Seas and Navigable Rivers.—As regards the territorial seas and navigable rivers, the law differs in material points from the law of England.

Crown's Right to Whales.—As regards the right to whales caught within the territorial seas, the right extends only to whales of a large size.[2]

Other Fish than Salmon.—The law of Scotland, like the law of England, recognises the right of the public

[1] See *ante*, p. . *Hutchinson* v. *Dundee Whale Fishery Co.* 5 Murr, 164, Erak. 2, 1, 6; *Aberdeen Whale Co.* v. *Sutter*, 4 Macqu. H. L. Cas.; *Addison* v. *Row*, 3 Paton, 334.

[2] Erak. 2, 1, 10; Stair, 2, 1, 33.

to fish in the sea and in public navigable rivers without any restriction, except as to salmon, which, as will be seen, is singled out from all other fish, and stands on its own footing. So far as regards other fish than salmon, the public are entitled to fish without any other restriction than is imposed by the Herring Fishery Acts; but even those Acts treat all the public alike, and only restrain fishing by certain nets and appliances, on grounds of public policy; whereas in England, even in the sea and pubic navigable rivers, the public may be excluded by an individual from fishing any kind of fish.[1] In Scotland there is no such title competent to exclude the public from the right of fishing for sea fish other than salmon. The Crown, it is true, seems to have had power to grant the exclusive fishery of oysters and mussels, which adhere to the soil. Hence a general grant of land adjacent to the sea *cum piscationibus* would include oysters and mussels, provided the grantee had for forty years and upwards exclusively exercised the right of taking these;[2] and statutes protect such fisheries from depredation.[3] The question, however, as to oysters, cannot be said to be settled, and the point was recently raised, whether the Crown had power to make a grant of oyster fishings in the seas surrounding the shores of Scotland, and whether the right to such fisheries still remains in the Crown, except it has been granted away to a subject, as is the case with regard to

[1] See *ante*, p. .

[2] *Ramsey* v. *Kellies*, 5 Br. Sup. 445; 2 Hailes, 723; 1 Stair, 2, 1, 5; Ersk. 2, 6, 17.

[3] 3 & 4 Vict. c. 74; 10 & 11 Vict. c. 92.

the salmon fisheries in the adjacent seas. The action was dismissed for want of a proper defender, without any opinion being expressed.[1] With regard to lobsters, it has been held that the right to lobster fishing, which requires no landing on the shore, belongs to the public, and not to the owner of the adjacent shore; and it is doubtful whether forty years' possession of lobster fishings, under a general grant of fishings in the sea, or even an express grant from the Crown of lobster fishings, will support the exclusive right;[2] and the public cannot be excluded from taking limpits, cockles, whelks, and small shell-fish and sea-weed below high-water mark, though the owner of the shore has a grant of fishings in salt and fresh water, and a barony bounded by the sea.[3]

As to floating fish other than salmon, though the Crown has sometimes granted the white sea fishings, the validity of such grant has never yet been judicially recognised, and has generally been doubted.[4] Hence, even though the salmon fishing in the sea or a navigable river exclusively belongs to an individual, the public have nevertheless the right to fish for other fish in the same locality, provided that they do not substantially injure such salmon fishing.

Navigation paramount to Fishing.—It may also be

[1] *Maitland* v. *Macclelland*, 21 Dec. 1860, 33 Sc. J. 102; *Commissioners of Woods and Forests* v. *Maitland*, 21 Dec. 1860, 33 Sc. J. 102. A grant of oyster fishing in a loch, gives the right of exclusive possession; *Agnew* v, *Mayor of Stranraer*, 2 S. D. 42.

[2] *D. Portland* v. *Gray*, 11 S. D. 14.

[3] *Hall* v. *Whillis*, 14 D. B. M. 325.

[4] *Ramsay* v. *Kellies*, 5 Br. Sup. 445. Per Hope, J. C. *Hall* v. *Whillis*, 14 D. B. M. 325.

noticed that the public right of navigation, as compared with the right of fishing, is the paramount right; and where fishing is incompatible with that, the right of the fisher must give way to that of the navigator.[1]

Oyster Fisheries.—The general law as to fishing oysters is the same in Scotland as in England. A statutory enactment protecting oysters from larceny (which formerly existed in England in 7 & 8 Geo. c. 29, § 36, now in 24 & 25 Vict. c. 96, § 26) was extended to Scotland by the 3 & 4 Vict. c. 74.[2]

[1] *Colquhoun* v. *D. Montrose*, M. 12827; *Grant* v. *D. Gordon*, 9 Mar. 1802, F. C. 20 Feb. 1782 F. C.

[2] "If any person in Scotland shall wilfully and knowingly take and carry away ony oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person or persons, body corporate or politic, and sufficiently marked out or known as such, every such offender shall be deemed guilty of theft, and being guilty thereof shall be liable to be sentenced to imprisonment not exceeding the term of one year."—3 & 4 Vict. c. 74, § 1.

"And be it enacted, That if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of such oyster fishery in Scotland, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall with any net, instrument, or engine drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of an attempt to commit theft, and being convicted thereof shall be liable to be punished by fine or imprisonment, or both, as the Court shall award; such fine not to exceed twenty pounds, and such imprisonment not to exceed three calendar months."—§ 2.

"Provided always, and be it enacted, That nothing in this Act contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only."—§ 3.

"Provided always, and be it enacted, That nothing in this Act contained shall prevent or be construed to prevent any person or persons from exercising any right which may now be lawfully exercised within the limits of any such fishery."—§ 4.

Mussel Fisheries.—Though in England mussels are not protected, like oysters, by penal enactments against depredation, they are protected in Scotland by statute 11 & 12 Vict. c. 92, which resembles the Scotch statute 3 & 4 Vict. c. 74, as to oysters.[1]

Herring Fisheries.—The herring fisheries in Scotland were governed by the same statutes as those in England up to 1860, when two Acts for Scotland alone were

[1] "If any person in Scotland shall wilfully, knowingly, and wrongfully take and carry away any mussels or mussel brood from any mussel bed, scalp laying, or fishery, being the property and in the lawful occupation of any other person or persons or body corporate or politic, and sufficiently marked out or known as such, every such offender shall be deemed guilty of theft, and being guilty thereof shall be liable to be sentenced to imprisonment not exceeding the term of one year."—11 & 12 Vict. c. 92, § 1.

"If any person shall unlawfully use any dredge, or any net or instrument or engine whatsoever, or shall trespass within the limits of any mussel bed, scalp laying, or fishery in Scotland, being the property and in the lawful occupation of any other person or persons or body corporate or politic, and sufficiently marked out or known as such, for the purpose of taking mussels or mussel brood, though none shall be actually taken, or shall, with any net, instrument, or engine, or with the hand or otherwise, drag or fish upon the ground or soil of any such mussel bed, scalp laying, or fishery, every such person shall be deemed guilty of an attempt to commit theft, and being convicted thereof before the Sheriff of the County shall be liable to be punished by fine or imprisonment, or both, as the Court shall award, such fine not to exceed ten pounds, and such imprisonment not to exceed three calendar months."—§ 2.

"Provided always, and be it enacted, That nothing in this Act contained shall prevent any person, lawfully entitled there to fish, from fishing for or catching any floating fish within the limits of any mussel fishery, with any net, instrument, or engine adapted for taking floating fish only."—§ 3.

"Provided always, and be it enacted, That nothing in this Act contained shall prevent, or be construed to prevent any person from exercising any right possessed by such person of taking bait, or any other right which may now be lawfully exercised by such person within the limits of any such fishery."—§ 4.

passed.[1] As already stated, the legal method of catching herring is by drift-nets, having meshes of not less than an inch from knot to knot, or having thirty-six squares to the yard.[2] Trawling for herring was introduced about the year 1838, and became a system in 1846, and was chiefly practised on the West Coast of Scotland. The trawl-net was used like the seine. Seining and trawling were rendered illegal by the Acts 14 & 15 Vict. c. 26, 23 & 24 Vict. c. 92, and 24 & 25 Vict. c. 72.[3] A close time for herrings was also enacted for the West Coasts of Scotland up to Point Ardnamurchan, viz. from 1st January to 31st May, inclusive, and from the north of Ardnamurchan to Cape Wrath, from 1st January to 20th May, inclusive.[4] And persons selling herrings or herring fry, which they know to have been taken on the West Coast during close time, incur a penalty of 5*l.* and forfeit the herring and boats.[5]

Definition of Fishery.—In Scotland the law of fishing, in point of nomenclature, has not been embarrassed by the unfortunate classification, which caused so much confusion in England, into common, several, and free fishing, and common of piscary. Those distinctions are entirely unknown. The right of fishing, whether public, or several, or free, is merely called by the generic name

[1] See the previous statutes, *ante*, p. .

[2] 48 Geo. III. c. 110, § 12.

[3] The report of the Royal Commissioners on the operation of the Acts relating to trawling for herring on the coasts of Scotland, recommends that the restrictions on trawl fishing should be withdrawn, and the fishermen left to choose their own mode of fishing.

[4] 23 & 24 Vict. c. 92, § 4.

[5] 24 & 25 Vict. c. 72, § 1.

of the fishing or fishery, though the latter term is also frequently appropriated to the locality where the fishing exists. The rights, in point of substance, however, do not materially differ from those in England, for the distinctions represented by those terms, when properly explained, exist in the nature of the subject-matter.

CHAP. II.

RIGHT TO SALMON GENERALLY.

RIGHT TO SALMON IN SEAS AND RIVERS—SALMON FISHING MUST BE DERIVED FROM CROWN—MODE OF FISHING AT COMMON LAW IN RIVERS—COMMON LAW, HOW AFFECTED BY OLD STATUTES—RESULT OF STATUTES AND COMMON LAW — NET AND CABLE FISHING FOR SALMON—NET FISHING, AS BETWEEN OPPOSITE RIPARIAN OWNERS — RIGHT OF FISHER TO USE SHORE — RIGHT OF FISHER TO USE RIVER-BANKS—BOUNDARIES OF FISHERIES—REMEDY BETWEEN OWNERS OF FISHERIES—REMEDY BY INTERDICT—FISHINGS OF LOCALITY LANDS—FISHING IN A LAKE.

Right to Salmon in Seas and Rivers.—The right of the public to fish in the territorial seas and navigable rivers is not in Scotland embarrassed by the statute of Magna Charta, which has no application there. The leading distinction is between salmon and all other fish, and the leading principle is, that the salmon fishing by net in all the seas and rivers of Scotland belongs to the Crown until a grant can be shown to some individual. "There can be little doubt," says Lord Chelmsford, L. C.[1] "that salmon fishings at an early period of the history of Scotland were regarded as possessing a peculiar value

[1] *Gammel* v. *Commissioners of Woods and Forests*, 3 Macq. H. L. C. 455.

over other fishings, and were distinguished from them in a remarkable manner. They were classed *inter regalia.* They were only capable of belonging to a subject by an express grant from the Crown, or by a grant of fishings generally, followed by such an user of salmon fishing as proved that it was intended to be comprehended within the general terms of the grant."[1] This doctrine is a fundamental one, and was thus described by twelve Scotch judges in a recent case:[2] "According to the concurring testimony of all our law authorities, salmon fishing is considered as a beneficial right of property, and is held to be vested in the Crown; or perhaps, speaking more properly, to remain with the Crown, unless it has been made the subject of special grant to a private party. It is needless to speculate on the circumstances from which this susceptibility of appropriation took its rise—very probably from the value of the fish, combined with that peculiarity of its habits which rendered the operation of catching it, in a great measure, dependent or connected with the possession of the adjacent shore. But certain it is that by the law of Scotland it is a right of property, and, whether granted by or remaining in the Crown, a beneficial right." Accordingly, in the above case it was settled that the Crown has still the patrimonial right of fishing for salmon, not only in all the rivers of Scotland, but in the open coast surrounding

[1] See also Craig, 1, 16, 24; 2, 8, 7. Ersk. 2, 1, 10; 2, 6, 17. Stair, 2, 1, 5; 2, 3, 39. Bell's Pr. § 646, 671.

[2] *Gammell* v. *Commissioners of Woods and Forests,* 3 Macq. H. L. C. 142.

the land, unless it can be shown affirmatively that the Crown has granted away such right to the subject.

The right, however, is confined to that kind of fishing which is carried on, not from ship-board, but by stake-nets, bag-nets, and by net and coble and other similar modes, all of which, it is a matter of notoriety, imply either the connexion of the apparatus with the coast, as in the case of stake-nets and bag-nets, or the use and possession of the coast as in the case of net and coble. In short, the modes of fishing on the coast, which are vested in the Crown, are those in which the use and possession of the coast is essential to the operation.[1]

When it is said that the Crown has also the exclusive right of fishing salmon in private rivers and streams, it must be understood with this limitation, that it is only such right of fishing as can be exercised by other modes than angling or rod-fishing, for the riparian owner has always the right of rod-fishing for salmon as well as for other fish, as an incident of his right of property.[2] Indeed, rod-fishing for salmon is a distinct and independent right, and no length of user of it will found a right of salmon fishing with nets, &c., even though there is a grant *cum piscationibus*.[3]

Salmon Fishing must be derived from Crown.—The leading principle of the common law, therefore, is, that the right of salmon fishing by net and other means than angling must be derived from the Crown. The grant

[1] *Gammell* v. *Commissioners of Woods and Forests*, 3 Macq. H. L. C. p. 454.

[2] Bell's Pr. § 671. *Duke of Sutherland* v. *Ross*, 14 S. D. 960; *Guthrie* v. *Dunbar*, 26 June, 1855.

[3] *Milne* v. *Smith*, 23 Nov. 1850, 13 D. B. M. 112.

may be either express—*cum piscationibus salmonum*, or it may be general—*cum piscationibus*, only, provided in the latter case the possession under the grant has been of salmon fishing, for the user interprets and gives precision to what would otherwise be an indefinite right, and shows what was meant by the grant. The one kind of grant is quite as effectual as the other, if possession has accompanied the general grant. Hence a general grant of fishing, coupled with possession of salmon fishing, will prevail against a later express grant.[1]

A Crown grant of cruive fishing has also been held good, though cruives are prohibited in some places by statute,[2] and cruive fishing has been held to be included in a grant of coble fishing, if followed by prescriptive possession of cruives.[3] So dams have been recognised as legal if prescriptive possession has existed.[4]

The kind of possession required under a general grant from the Crown, *cum piscationibus*, in order to establish a right of salmon fishing with net and coble, must be fishing with net or coble, or some kind which includes it. Thus, proof of mere rod-fishing for any length of time will not set up the right.[5] But a prac-

[1] *D. of Queensberry* v. *V. Stormont*, M. 14251; *Littlejohn* v. *Stratton*, 2 Paton. Ap. 19.

[2] *Grant* v. *D. Gordon*, M. 14297, 3 Paton. Ap. 678; *Johnston* v. *Stotts*, 4 Paton. 274.

[3] *Marquis of Inverness* v. *Duff*, M. 14257.

[4] *Robertson v. Mackenzie; Arbuthnot* v. *Scott*, 4 Paton. 337; *Scott* v. *Gillies*, 4 Paton, 750, M. 14290.

[5] *Milne* v. *Smith*, 13 D. B. M. 112; *D. Sutherland* v. *Ross*, 11 June, 1836, 14 S. D. 960.

tice for forty years and upwards of fishing with cairn-nets in the Tweed was held sufficient, because in the statute affecting the Tweed that mode of fishing was recognised as legal, if the net was attached to the banks, and, moreover, in the user the opponent's banks were openly used, which was the characteristic of the fishing by net and coble.[1] So mere fishing by rod and spear, or by hand-nets, will not suffice to set up a claim to fish by net and coble. If the practice is illegal, no length of time can sanction it.[2]

Mode of Fishing at Common Law in Rivers.—It is difficult to ascertain the common law of Scotland as to how far one riparian owner can exercise his skill and industry as well as avail himself of fixed machinery. Probably the only limit is that which is imposed by the maxim, *sic utere tuo ut non alienum lædas.* But such questions have not been left to the operation of the common law, for various ancient statutes have been passed which have given rise to a kind of secondary common law, and the result is that it is illegal to resort to any unusual method of catching the fish. But mere diligence or continuity of practice with the ordinary methods cannot be interfered with, though the real effect of that may be much the same as if some expeditious machinery or apparatus were invented which would have the effect of catching in an hour as many fish as the ordinary method would do in twelve hours or a week. If the party, for example, in the lower part

[1] *Ramsay* v. *D. Roxburgh*, 9 Feb. 1848, 10 D. B. M. 661; *Chisholm* v. *Fraser*, M. Ap. 14302; *Sutherland* v. *Ross*, 11 June, 1836.

[2] *Mackenzie* v. *Renton*, 2 D. B. M. 1078.

of a river uses all the diligence he can in a lawful way, there is no common law or statute law to prevent him from catching every fish that attempts to ascend the river. The limitations on his power to do so arise from the habits of the salmon, and the limits to human skill and dexterity. It cannot be said that no improvement is to be allowed in the old-established mode of using the net and coble, nevertheless the question always comes round to this, Is the alleged practice substantially different from that of net and coble?[1]

Common Law as to Salmon, how far Superseded by Statute.—As regards the question how far the statutes and common law go in the way of destruction, Lord Neaves[2] says: "It is perhaps not easy to determine how far the old Scottish statutes as to salmon were intended merely to provide for the free passage of the fish, and the preservation of the breed, or were also designed to enforce a system of fair play among the several and successive heritors of fishings in the river. It may probably be thought that there was a double object in view; and it seems at least to be settled that any co-heritor of fishings in a river has a title and interest to object to the use of any illegal mode of fishing by any other heritor. Nor does it seem to be of any importance whether the illegality alleged arises from the express provisions of the statutes, or from the principles of common law, or even from that kind of common law which has been said in Scotland to spring up from the general import and tendency of the older statutes,

[1] See *Hay* v. *Provost of Perth*, 35 Sc. Jur. 463.
[2] *Hay* v. *Mag. of Perth*, 20 Dec. 1861.

where their provisions are not literally sufficient to reach the case. There seems with respect to salmon fishings in a river to be such an amount of common interest in the several proprietors, as to give a title to any one of their number to challenge the operations of another, when conducted in a manner which the law does not sanction.[1]

So Lord Corehouse thus stated the general effect of the statutes:[2] "It is settled law that with the exception of cruives and yairs, every barrier or permanent erection placed in the channel of a river to obstruct salmon in ascending the stream, is illegal, whether the immediate object is to prevent their passage altogether, or to impede or delay it, so that they may be more easily taken below. Some of our statutes regarding this subject are loosely and imperfectly expressed, applying in words only to the illegal modes of fishing practised at their dates. But the evident object of all of them is that which has now been stated. Accordingly, it has been recognised as such in various cases, and effect has been given to them accordingly. To mention one example, though none of the statutes is expressly applicable to stake-nets, which are essentially different from the old yairs, the Court had no hesitation in finding that those nets fell under the prohibitions. Indeed,

[1] These old Scotch statutes are 1424, cc. 10, 11; 1427, c. 6; 1429, c. 22; 1457, c. 85; 1469, c. 38; 1477, c. 73; 1489, c. 15; 1503, c. 72; 1535, cc. 16, 17; 1563, c. 68; 1579, c. 89; 1581, c. 111; 1685, c. 20; 1696, c. 33; 1698, c. 3: and the recent Scotch Salmon-Fishery Act does not expressly repeal the old statutes, and therefore they are in force so far as not inconsistent with the latter.

[2] *Grant* v. *McWilliam*, 10 D. R. M. 666.

the general rule has been repeatedly laid down that fishing by means of any fixed machinery, or apparatus whatever, or in any way except by net and coble is illegal."[1]

Result of Statutes and Common Law.—The result of these ancient statutes, and of the decisions, was thus authoritatively stated by Lord Westbury, L. C. after an elaborate review,[2] to be as follows: "The principles which these acts embody, and the objects which the

[1] "The common law," says Hope, L. J. C. (*Ramsay* v. *D. of Roxburgh*, 10 D. B. M. 669) "will reach all kinds of obstruction in and across the river to the run of salmon; and all practices either destructive to the breed of the salmon, or so noxious to their tastes and instincts as to deter them from ascending higher than suits the interests of the party using such practices, *e.g.* the sheet covered with pitch. But modes of fishing not obstructing the passage of the salmon, and not noxious, the common law will not reach or put down."

"The common law," says Lord Deas (*Hay* v. *Provost of Perth*, *supra*), "construed a grant of salmon fishing in a river as limited in respect of the mode or modes of fishing; and if limited at all, it is easy to see how it must, almost of necessity, have come to be held, as I think it has been, from the earliest times downwards, that the limitation was to the ordinary mode or modes of fishing in such rivers as those to which the grants were applicable. Nothing more was understood to be authorized by the general grant. All unusual modes of fishing required special grants or possession sufficient to presume such grants, and the main object of the statutes was to remedy abuses which had arisen from these special grants or presumed grants, but certainly not to infringe upon the common law in a wrong direction, by enabling the holders of general grants to fish in any way, however unusual, not struck at by the statutes. It is impossible attentively to read these statutes, penal throughout, and to hold that they form the whole law applicable to the different modes of salmon fishing in Scotland. They may serve to show the spirit of the common law, but they do not exclude or supersede the common law, as is evident from many of the most authoritative decisions in the books which are not confined to the enforcing of these enactments, as they must have been had there been no common law on the subject.

[2] *Hay* v. *Provost of Perth*, 35 Sc. Jur. 463, 4 Macq. Ap.

legislature sought to attain, were directed to three objects: (1), to ensure to the salmon a free and unimpeded access to the upper fresh waters, which are the natural spawning grounds of the fish; (2), to secure the unimpeded return to the sea of the smoult or young fry of the salmon; (3), to prohibit the killing of unclean fish during the fence months. For the purpose of accomplishing these objects, which are clearly declared in various statutes from the very earliest times down to the latest, the statutes rendered it unlawful to erect any cruives or wears in the waters where the sea ebbs and flows. Cruives and wears were allowed in fresh waters with certain limitations. One was that there should be a mid stream, the width of which is carefully defined. The other, that the hecks (as they are called), that is, the insterstices between the wicker-work of the cruives, should be at least three inches wide. Fishing is also prohibited at mill-dams by any description of fixed nets or engines. And there is an enactment rendering it absolutely necessary that a free passage should be given both at cruives and at the mill-dams in fresh water, from Saturday evening to the rising of the sun on Monday morning. These are the objects which the statutes sought to accomplish, and while they include provisions for preserving the breed of the fish, they nowhere descend to any directions touching the mode or the manner of fishing. When we come to the decisions upon the subject, we undoubtedly find from the earlier decisions that the *ratio decidendi* has been to secure the free passage of the fish both up and down the river. The earlier decisions give that as the reason

for holding that stent-nets were illegal; that stake-nets were illegal; that dykes and dams ought not to be erected, and that towing-paths could not be projected into the river for the purpose of fishing. And the general principle, and the reason for the determination, is therefore found to have been in strict conformity with the principles enumerated in the statutes. No doubt it was perfectly competent to the Courts in Scotland to extend their decisions beyond the letter of the enactments, proceeding upon that which we are accustomed to call in England the equity of the statute,—a mode of interpretation very common with regard to our earlier statutes, and very consistent with the principle and the manner according to which Acts of Parliament were at that time framed. I do not, therefore, pretend to deny that, so far, the decisions are consistent with the general principles of the statutes, and are perfectly in conformity with the law, and probably we are right in coming to the conclusion that these decisions have gone so far as to make it clear law at the present time that it is illegal to fish for salmon with any net, or with any species of engine or machinery devised or constructed for catching fish, which is a fixture, which is at all fixed or permanent even for a time in the water; and if I were asked to define the conclusion which I should derive from the statutes and the decisions, it would be this, that it is not legal to fish with a net unless when the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion during the operation of fishing. . . . The net and coble is merely symbolical of the proper legal form of

fishing, that legal form of fishing being by a net, which is not to be fixed or stented, or in any manner settled or made permanent in the river, but it is to be used by the hand, and it is not to quit the hand, but is to be kept in motion during the operation of fishing."[1]

[1] The decisions of the Courts from which the above conclusion was deduced, viz. that other modes of fishing salmon than net and coble are illegal, have been as follows:—Thus the Court has declared to be illegal all fixed nets for preventing the fish going up the river—*Duke of Queensberry* v. *M. of Annandale*, M. 14279; hang-nets, also cairn-nets—*Dirom* v. *Lillies*, M. 14282; *Grant* v. *McWilliam*, 10 D. B. M. 666; stake-nets and topt-nets—*Carnegie* v. *Ross*, 7 S. D. 284; *Dalgleish* v. *D. Athole*, 5 Dow. 282; *Graham* v. *Dixon*, 6 Paton. 163; *D. of Athole* v. *Wedderburn*, 5 S. D. 153; Dykes, *Cunningham* v. *Taylor*, Hume, 715; Yairs, *Fraser* v. *Duff*, 8 S. D. 14, 5 W. S. 57. See *Murray* v. *E. Selkirk*, 2 S. D. 106; stent nets fixed to an anchor in the stream—*Colquhoun* v. *Mag. of Dumbarton*, 4 Paton, 221; *Mackenzie* v. *Houston*, 25 May, 1830, 8 S. D. 796; or nets fixed to a stone—*D. Queensberry* v. *M. Annandale*, M. 14279; Coble Fishers of Don, M. 14287; fixed machinery—*Lord Gray* v. *Lime*, 9 July, 1835; sights erected *in alveo flumenis*, *i.e.* embankments to make the river shallow at places, so that the fish may be seen passing over, *Forbes* v. *Smith*, 2 S. D. 721, 1 W. S. 583; a dike of loose stones with a basket in the middle, *Fife* v. *Gordon*, M. 14304; cairn-nets (except in the river Tweed) and stream-dykes, *Grant* v. *McWilliam*, 10 D. B. M. 666; nets in combination with stakes fixed in the *alveus* of the river, *Colquhoun* v. *D. Montrose*, M. 14281, 14283; cruives sheeted with pitch, *Carnegie* v. *Mag. of Brechin*, M. 14288. So also placing a row of loose stones, not of any considerable size, in the bed of the river, and not across it, but merely on the edge of a pool, to facilitate fishing by net and coble, is illegal, *Trustees of Copland*, 13 June, 1810. Even a spear cannot be used in combination with a permanent barrier, per L. Corehouse, *Grant* v. *McWilliam* 10 D. B. M. 667.

At a part of the Frith of Forth, two miles wide at full tide, but the proper channel being only half a mile wide, an inclosure of fifteen acres was made by stakes and netting at a distance of a mile and a quarter from the river-bank, and so contrived that it opened as the tide flowed, and shut when the tide ebbed, keeping in all the salmon that may have entered during the flowing of the tide. Besides this, a line of netting 812 yards long ran obliquely down the river, and served to direct the fish to the enclosure, as well as to take the fish coming down with the ebb tide. The meshes of the net were twelve inches in cir-

Net and Coble Fishing for Salmon.—The law, therefore, may now be taken to be settled that the only

cumference. The upper proprietors having complained of this, it was urged in defence that the net did not destroy the fry, and that it did not occupy the whole of the proper channel of the river; but the Court held it contrary to the statutes, chiefly the Act 1583, *E. Kinnoul* v. *Hunter*, M. 14301.

So, where a net was used in the Tay, of which one end was fixed to the shore, and the other moored in the water, but which had no poke nor bag to entrap the fish, and was drawn every tide, the Court granted an interdict in these terms:—"Interdict from fishing by means of nets stretched or stented in the river Tay, having the one end made fast to the shore, and the other fixed by a mooring in the water, and remaining stationary in the water, so as to obstruct the passage of the salmon, and force or decoy them into courts or enclosures of netting, within which they are caught; and further interdict from using any fixed machinery for catching salmon, or any other mode of fishing than the ordinary mode by net and coble."—*Gray* v. *Lime*, 13 S. D. 1089.

The law as to rivers is distinct from that as to the sea, and there is, in fact, a separate code applicable to each. Hence the owners of fishings on a river form a separate kind of community. Thus, where a river proprietor near the mouth of the river threw a wear across the river without leaving slaps in it for the passage of salmon, as required by the statute 1696, c. 33, it was held, nevertheless, that the owner of fishings in the adjacent sea had no title to complain and enforce the Act against the river-proprietor, though he alleged that, owing to the formation of the wear, salmon had forsaken his fishery, *Munro* v. *Ross*, 7 July, 1846, 3 D. B. M. 1029. So a river-proprietor has a right to complain of a dam-dyke which obstructs the fish of the river, though he himself has erected similar obstructions, *Forbes* v. *Leys*, 9 D. B. M. 933, 5 W. S. 384. Where the statutes prohibit stake-nets within flood-mark, or where the sea ebbs and flows, they are difficult of application to particular localities where there is a disputed boundary between salt and fresh water, *Ross* v. *Duke of Sutherland*, 3 Bell's Ap. C. 315, 6 D. B. M. 425. And the space between the highest flood-mark and the lowest ebb-mark is not always to be adhered to, and was held inapplicable to the Kyle of Dornoch.—Ibid. Stake-nets are prohibited in the mouths of rivers, as well as in the rivers, *Mackenzie* v. *Horne*, 16 S. D. 1286, but are not illegal in the sea, or places not close to the mouths of rivers, and not necessarily obstructing the fish there, *Mackenzie* v. *Syme*, 8 S. D. 1013; *Carnegie* v. *Ross*, 7 S. D. 284; *Carnegie* v. *Brand*, 4 W. S. 641; *E. Kintore* v. *Forbes*, 4 S. D. 641, 3 W. S. 261.

lawful ways of fishing are by the rod either from shore or a boat, or by net and coble, the essential feature of which last kind of fishing is that the net be not fixed, but held in the hand during the operation of fishing.

The ordinary mode of fishing by net and coble is as follows:—The coble or boat goes out with the net in it. The fisherman in the coble begins to drop or pay out the net at any point he chooses, embracing within his sweep as much of the stream as possible, or the whole breadth of the stream if he can do so. A person on shore holds a rope attached to one end of the net, and that rope is of such length as is suitable for drawing the net; the man with the coble makes a sweep, and arrives at a point further down the river, and in the meantime the person who had hold of the rope at the point from where the coble started, makes his way by walking along the bank of the river, or in the river, till he reaches the point at which the net is to be drawn on shore, and then both ends of the net are drawn in.

It is not, however, to be tolerated that no improvement is ever to be made in the stereotyped clumsy forms of using the net and coble which prevailed in ancient times, and that this is not the law was recently determined.

This point was solved by the Bermoney boat case in the river Tay.[1] In 1821, a practice of fishing called the Bermoney system was introduced in the river Tay, which the other proprietors objected to as illegal. This system was as follows:—A pin, or stake, or other ful-

[1] *Hay* v. *Provost of Perth*, 35 Sc. Jur. 463; 34 Sc. Jur. 115.

crum, is fixed in the *alveus* of the river, while another pin or fixture is fastened in the bank lower down the stream. Between these two points a rope is extended, along which a boat called a Bermoney boat is made to play. In connexion with the boat thus attached is another boat, being an ordinary coble, which, starting from the Bermoney boat at the point or pin fixed in the stream, carries out the net for fishing, into the current of the river. The tow-rope of the net is left in the Bermoney boat, and is taken back to land in that boat in the line of the Bermoney rope, while the outer end of the net is carried down the stream by the coble at a convenient sweep, and then landed near the pin on the shore, where the net is hauled in. The effect of this mechanism is, that the proprietor of the fishing can start with his fishing coble from a point further out in the stream than the fishers could gain by wading, so that in a tidal river the parties using this method can fish longer in each day at the same place than would otherwise be possible, being enabled thereby to fish not only when the tide is out, but when it has risen so high that no one could stand in the water where the Bermoney boat can reach. The Bermoney boat is thus equivalent to a gangway or towing-path projected into the channel, and affording an advanced basis for thence reaching the more central points of the stream when these would be inaccessible without such a contrivance. The legality of this method of fishing was discussed in the Court of Sessions, when that court held that it differed essentially from the ordinary mode of net and coble, and therefore was illegal. But on appeal, the

House of Lords reversed the decision, and held that the Bermoney boat system was in reality not substantially different from the net and coble, for the essential characteristic of the net and coble fishing was, that the net should be not fixed, but held in the hand of the fishermen during the operation, and the appliance of the Bermoney boat contained the same feature.

Net-fishing as between Opposite Riparian Owners.—Where fishing is by net and coble, it is the common practice, which parties on both sides have an interest to act on and preserve, that the shot from either side is run out beyond the centre before the net is drawn in again to the side.[1] This is, however, not a legal right, and cannot be insisted in by either of the opposite proprietors, except as matter of mutual accommodation. Lord Medwyn observes:[2] "Although I believe that the arrangement as to the alternate shots may be held universal, as the only mode of carrying on fishings situated opposite to each other with the requisite advantage and equality, and without constant squabbling and breach of the peace, I cannot say that I would hold it a legal right to be enforced by a court of law; nor will it give any right to the one party to fish within the bounds of the opposite fishing, except for the net-fishing alone:" and as to rod-fishing, the learned judge thought the same was true. In a prior case, however, Lord Craigie said:[3] "Where a party has a right of fishing, I conceive he is entitled to shoot his nets quite across

[1] *Milne* v. *Smith*, 23 Nov. 1850.
[2] *Milne* v. *Smith*, 23 Nov. 1850, 13 D. B. M. 121.
[3] *Ashburton* v. *Mackenzie*, 7 S. D. 849.

the river, and that it is an accessory of this right that he may draw his nets on the lands *ex adverso* of those from which he has the right to fish; and other Judges seemed to concur, where there were two parties having the right to fish the river together." Probably mutual convenience will lead to this arrangement seldom being objected to on either side.

Right of Fisher to use Banks and Shore.—The right of fishermen to use the banks for the purpose of fishing is not the same as to the sea as it is in rivers. In an old case[1] it was said, "They who are in infeoft in salmon fishings by the king have thereby the right and privilege to draw their nets to the nearest land, and slay their fish upon the same, and to infix pales and trees upon the land adjacent to the river where the sea ebbs and flows, and to dry their nets upon them, and mend their nets; and albeit the said land be bounded to the river, yet the heritors thereof must leave so much ley nearest the river-side as is necessary for the foresaid uses of the said fishings, and must neither till it nor dig dikes upon it, which may hinder the commodity of said fishing in manner aforesaid." In a recent case, however, a Judge of great experience said that "There is no common law right of the fishermen in the sea to draw their nets on shore above high-water mark, and it is doubtful even if user or custom for more than forty years will presume a grant or dedication by the owner."[2] And where such use was alleged to be founded on the statute 29 Geo. II. c. 23, it was held that the use was

[1] *Malben* v. *Blair*, M. 14263.

[2] *Hoyle* v. *McCunn*, 10 Dec. 1858, 31 Sc. Jur. 63.

confined to the limits specified, but was equally available to all persons fishing on the coast of Scotland.[1]

Use of River Banks.—But as regards rivers, a party entitled to the salmon fishing is entitled to access to the banks on both sides of the river in order to exercise his right, though this must be done in a way the least oppressive to the adjoining heritors.[2] Lord Craigie said:[3] "A grant of salmon fishing gives as effectual a right to the grantee to make use of the adjoining banks for fishing as a disposition of property gives to a disponee. It is an error to call it a mere servitude, for it is properly an accessory to that which is itself property; at the same time it must be used with discretion." The other Judges concurred. It seems only, however, as incidental to the net and coble fishing, and not to rod fishing, that the use of the banks is allowed.[4] Thus where *A* had a general grant of salmon fishings in a river with net and coble, and *B* had the land adjoining one side thereof, but had no grant of salmon fishing, it was held that *A* had not an implied right to go on *B*'s lands to fish salmon with the rod.[5]

Boundaries of Fisheries.—It is often difficult to ascer-

[1] *Hoyle* v. *McCunn*, 13 Dec. 1858, 31 Sc. Jur. 63.

[2] *Mommuste* v. *Forbes*, M. 14263; *Forbes* v. *Smith*, 2 S. D. 721; *Miller* v. *Blair*, 4 S. D. 214. See also *Mackenzie* v. *Sutherland*, 2 W. S. 158.

[3] 4 S. D. 218.

[4] *Forbes* v. *E. Kintire*, 4 S. D. 450.

[5] *Guthrie* v. *Dunbar*, 26 June, 1855, 27 Sc. J. 511. Where a party had a grant of salmon fishing in and round an island in a river, and another party had a grant of salmon fishing adjoining his lands opposite, and the channel was too narrow to admit of both fishing without mutually encroaching, the Court held they had an alternate right of fishing, *Gray* v. *Mag. of Perth*, 1 Paton, Ap. 645.

tain the precise boundaries of a grant of salmon fishing, and litigation between adjoining proprietors thus arises. In construing grants of fishing, it has been held that a grant by *A*, the owner of the whole fishings in the river, to *B*, who was the owner of lands of *S*, on one side of the river, of the privilege of salmon fishing as far as the lands of *S* extended, and no further," was a grant of the fishing only on one side of the river, viz. next to *S*, especially where no possession of fishings on the other side had followed.[1] A grant by the Crown to *A* of lands lying along part of the shore of a salt-water lake or bay, "with the fishing of salmon in the bay," is a grant of the whole of the fishing throughout the bay, though opposite lands of other proprietors, though these have a general grant of fishings but no possession.[2] The only title which can compete with an express grant of salmon fishings in such a bay is a special title of the same order, or exclusive possession on a liable title for the years of prescription. Lord Moncrieff observed, that it was an entire fallacy to suppose that a title of salmon fishing, expressly given over all the limits of a certain bay or river within specified bounds, does not give a right to fish *ex adverso* of another man's lands without proof of prescriptive possession of so fishing.[3]

Remedy between Owners of Fisheries.—Any proprietor of fishings in a river has a good cause of action or title to challenge any other person who resorts to illegal modes of fishing. An upper proprietor may sue

[1] *Macinroy* v. *Duke of Atholl*, 11 June, 1858, Sc. Jur. 665.
[2] *Mackenzie* v. *Dandron*, 27 Feb. 1841, 3 D. B. M. 646.
[3] Ibid, p. 657.

a lower proprietor, or *vice versâ*;[1] but proprietors of salmon fishings in an adjacent river have no right to complain of heritors who have a grant of fishing by net and coble from the Crown, exercising such right by stake nets.[2]

It frequently happens that one proprietor commences an action of declarator against another, and it turns out that his title is weaker than that of his adversary, in which case the action is dismissed.[3] And a lakesman or proprietor of fishings on a river above a certain place cannot insist, by an action of declarator, that a proprietor lower down has no right to fish *ex adverso* of his own lands; in short, one who has no right at the same place cannot insist on a proprietor producing his titles so as to show whether he has or not.[4]

Remedy by Interdict.—An interdict (or injunction) may be applied for in the local Sheriff's Court, as well as in the Court of Session, though in the former case no suit is competent which resolves itself into a competition of heritable rights, or involves questions of title. Hence a party who produced title to the land adjacent to a loch, and alleged exclusive possession to the fishing therein, was held entitled to an interdict from the Sheriff's Court against one who fished there, for the petitioner only claimed a possessory right.[5] An

[1] Ersk. 2, 6, 15; *Colquhoun* v. *D. Montrose*, M. 14283.

[2] *E. Kintire* v. *Forbes*, 4 S. D. 641, 3 W. S. 261.

[3] *Lord Abercromby* v. *M. Breadalbane*, 18 July, 1843, 5 D. B. M. 1389.

[4] *Mackenzie* v. *Houston*, 6 S. D. 359, 8 S. D. 117, 5 W. S. 422; *Mackenzie* v. *Gilchrist*, 7 S. D. 297; *Sinclair* v. *Murray*, M. 14277.

[5] *Johnstone* v. *Gibson Craig*, 5 Mar. 1862.

[6] Thus also *A*, who has a Crown charter *cum piscationibus*, and avers

interdict may be granted against the use of any mode of fishing except by net and coble.[1] On the granting of an interdict, an account will be ordered to be kept of the fish taken till the right is tried;[2] and if necessary, the Court will order landmarks to be put up to divide the fishings.[3]

Fishing of Locality Lands.—The salmon fishing in a river being a valuable right, capable of being let separately from the lands, forms a valuable item in the yearly rent of the estate with which it is connected, and hence where a settlement makes it necessary to compute the yearly rent of an estate, in reference to certain provisions made to a widow or children, the value of the fishings must be included as an item, whether they are, in fact, let separately or not.[4]

Fishing in a Lake.—The right of fishing in a lake, of which two or more are joint owners or common proprietors, may be alienated by any of the co-owners, or

possession, is entitled to interim interdict against *B* fishing salmon within the limits of the charter, who has lands but no such title, though he avers immemorial possession, *Ross* v. *Robertson*, 14 Nov. 555, 28 Sc. J. 5. So the owner of a loch and the salmon may obtain interdict against any of the public who trespasses for trout fishing, *Montgomery* v. *Watson*, 28 Feb. 1861, 33 Sc. J. 312. On the other hand, where *A* has a general grant *cum piscationibus*, which the possession has not extended beyond a certain point, he will not succeed in claiming the fishing beyond that point merely because his opponent's right is doubtful, *Richardson* v. *Hay*, 12 Mar. 1862, 34 Sc. Jur. 383.

[1] *Mackenzie* v. *Houston*, 8 S. D. 796; *D. Atholl* v. *Wedderburn*, 5 S. D. 153.

[2] *E. Fife* v. *Mag. of Banff*, 8 S. D. 137.

[3] *E. Gordon* v. *E. Morny*, 2 Paton. Ap. 78.

[4] *Leith* v. *Leith*, 5 June, 1862, 34 Sc. Jur. 523; *Menzies* v. *Menzies*, 10 Mar. 1852, 14 D. B. M. 651, 33 Sc. Jur. 718; *Sinclair* v. *Duffus*, 5 D. B. M. 174; *Macpherson* v. *Macpherson*, 1 D. B. M. 794, 5 Bell's Ap. C. 280.

subdivided, provided the co-owner and his alienees do not take a larger right than the co-owner was himself entitled to.[1] Where one of two co-owners of a loch has not had an exclusive possession, he cannot interdict the other from fishing merely because the other's title does not expressly include fishings.[2]

[1] *Menzies* v. *Macdona'd*, 1 Macq. H. L. C. 28 Sc. Jur. 453.
[2] *Macdonald* v. *Farquharson*, 14 Dec. 1836, 15 S. D. 259.

Deposited Oct 17/63

CHAP. III.

SCOTCH SALMON FISHERY ACT, 1862.

MODERN ACTS GENERALLY—FISHERY DISTRICTS—FISHERY COMMISSIONERS—ANNUAL CLOSE TIME FOR SALMON FISHING—WEEKLY CLOSE TIME — ILLEGAL MODES OF FISHING — OFFENCES AS TO SALMON — SALMON-ROE — POISONING SALMON-RIVERS — DUTIES OF FISHERY COMMISSIONERS—FISHERY DISTRICT BOARDS—POWERS OF DISTRICT BOARDS—ASSESSMENTS BY DISTRICT BOARDS—SEIZURE OF FORFEITED ARTICLES — THREE OR MORE POACHING SALMON BY NIGHT—PROCEDURE TO RECOVER PENALTIES—POACHERS OF SALMON GENERALLY — APPREHENSION OF POACHERS — PROCEDURE AND PENALTIES FOR POACHING.

Modern Acts Generally.—The salmon fisheries of Scotland long remained under the protection of the ancient statute; but, in 1828, an Act[1] for the preservation of the salmon fisheries in Scotland was passed, and an Amending Act in 1844.[2] Though these Acts have not been expressly repealed by the recent Salmon Fisheries (Scotland) Act, 1862, 24 & 25 Vict. c. 97, which came into operation on 1st January, 1863, they have been so impliedly, and need not be further noticed. By this last Act,[3] the English Salmon Fisheries Act, 1861, will be applied, after 1st January, 1865, to the

[1] 9 Geo. IV. c. 39. [2] 7 & 8 Vict. c. 95.
[3] See the Appendix.

salmon fisheries in the Solway Frith, situated in Scotland, and to the rivers flowing into the same, though the offences will be punishable under the Scotch Act.[1] The Tweed still remains subject to a separate Act, called the Tweed Fisheries Amendment Act, 1859; but three enactments in this Act extend to the Tweed, as afterwards noticed.

Fishery Districts.—Each river in Scotland which flows into the sea, and its tributaries and the sea-coasts adjoining, are to form a fishery district.[2]

Fishery Commissioners.—The Home Secretary has power to appoint three Commissioners, with a salary and travelling expenses, to continue in office not longer than three years.[3] Their duties are:—1. To define the limits of the river and estuary from the sea.[4] 2. To fix the limits of the Solway Frith. 3. To fix the limits of each fishery district. 4. To fix a point on each river below which are the lower proprietors, and above which are the upper proprietors. 5. To fix the dates of the annual close time for each district. 6. To make general regulations as to the due observance of the weekly close time, the construction of cruives, the construction and alteration of mill-dams, or lades, or water-wheels, the meshes of nets, and obstructions generally to the passage of salmon.

But these powers are not to interfere with vested rights of salmon fishing legally existing.[5]

[1] 25 & 26 Vict. c. 97, § 33. [2] Ibid, § 4.

[3] Ibid, § 5.

[4] The difficulty of doing so at common law was shown in the case of *Ross* v. *D. Sutherland*, 3 Bell's Ap. 315, 6 D. B. M. 425.

[5] 25 & 26 Vict. c. 97, § 6.

Annual Close Time for Salmon Fishing.—The annual close time for every district shall continue for 168 days.[1] It shall apply to every mode of fishing, except angling, where the close time for angling in a district has been made to commence later and end sooner.[2] The annual close time, unless otherwise ordered by the Commissioners bye-law, is that which has been fixed by any local Act; and in regard to other rivers, the time fixed by 9 Geo. IV. c. 39 shall continue till altered.[3] The annual close time fixed by 9 Geo. IV. c. 39 was between 14th September and 1st February, and calculating those days exclusive, the period is 139 days. Therefore the Commissioners will require to add twenty-nine days to make up the limit prescribed by sect. 7. The annual close time for the Tweed is from 14th September to 15th February following.[4]

The Commissioners have no power to reduce or increase the annual close time, but merely have the power when they do determine to fix the commencement.[5] As regards, however, the annual close time for angling, they may alter it at discretion, provided always it commences later and ends earlier than the close time as to other kinds of fishing.[6]

Weekly Close Time for Salmon.—The weekly close time, except for rod and line, shall be from 6 P.M. on Saturday, to 6 A.M. on Monday.[7] The time must not

[1] 25 & 26 Vict. c. 97, § 7.
[2] Ibid, § 8.
[3] Ibid, § 9.
[4] 22 & 23 Vict. c. lxx. § 6.
[5] 25 & 26 Vict. c. 97, §§ 6, 7, 9.
[6] Ibid, §§ 6, 8.
[7] Ibid, § 7.

be less than thirty-six hours, but the commissioners may, on the application of the district board, or of any two proprietors of fisheries in the district, vary the period, *i.e.* vary the hour at which weekly close time shall commence.[1]

Illegal Modes of Fishing.—Nothing in the Salmon Fisheries (Scotland) Act, 1862, shall make legal the fishing, at any place, or by any mode, prohibited by any prior statute.[2] This section applies to the Tweed.[3] See *post*, "Poaching of Salmon."

Offences as to Salmon.—The statute (sect. 11), enumerates a variety of offences, which are made subject to a fine of 5*l.* and 2*l.* per fish caught illegally, besides forfeiting, at the discretion of the magistrate, every boat, net, rod, line, or other article used in fishing. Such offences are, fishing in close time, selling fish in close time, catching or possessing unseasonable salmon, or young of salmon, &c.

According to this enactment, no penalty is incurred for fishing with rod and line during annual close time, until the Commissioners by their bye-laws prescribe a time. But until such bye-laws are published, the 9 Geo. IV. c. 39, §§ 1, 2, is in operation, and prohibits, under a penalty of not less than 1*l.*, or more than 10*l.*, any rod-fishing for salmon between 14th September and 1st February. In England, rod-fishing for salmon is illegal only in November, December, and January.[4] Before a person can be sure what is or is not an offence, he must find out whether the Commissioners

[1] 25 & 26 Vict. c. 97, § 10.
[2] Ibid, § 34.
[3] Ibid, § 34.
[4] *Ante*, p. .

have published any bye-law as to close time, size of net-meshes, and other matters indicated in this and the sixth sections. During the weekly close time, an offence is committed by angling for salmon on Sundays; it is not so in England,[1] nor on the Tweed.[2]

The clause as to selling salmon in close time is somewhat unreasonable, for it requires a party to ascertain not only the beginning and ending of close time in his own district, but in all the other fishery districts of Scotland—an inconvenience, however, which will probably be neutralized by the Commissioners making the close time uniform throughout Scotland. It is to be observed, also, that it is only the selling or offering for sale of salmon during close time that is an offence, and hence the party buying salmon in close time commits no offence, though the purchaser of salmon in close time is in England subject to a penalty.[3] It will be no offence for persons in Scotland to sell in the Scotch close time salmon procured from England or Ireland or abroad, provided he is ready to prove that he procured them from those places. It is also to be observed, that the angler, whose close time is shorter than the net-fisher, is nevertheless prevented from selling the fish angled during the longer close time. It is the same in England.[4]

It is no offence (as it is in England),[5] to buy or sell unseasonable salmon, provided the party has not the fish in his possession.

[1] See *ante*, p.
[2] See *post*, p.
[3] See *ante* (§ 19), p.
[4] See *ante*, p.
[5] See *ante*, p.

No offence is committed by allowing the young of salmon to go aside into canals, reservoirs, &c., nor is it the duty of any owner to erect grating, &c., as in England;[1] in order to do so the district board must have the consent of all the river or estuary proprietors, and even then the board has no compulsory powers over private property.[2]

Salmon-roe.—All persons using, or possessing in order to sell, salmon-roe for fishing, incur a penalty of 2*l.*, besides forfeiting the salmon-roe.[3] Possessing or using salmon-roe for scientific, or other purposes than fishing, is no offence. Also using the roe of other fish for fishing is no offence in Scotland, though it is so in England.[4] This enactment applies to the Tweed fishery.[5]

Poisoning Rivers.—It is an offence to cause or permit to flow into salmon rivers poisonous matter, or sawdust.[6] The common law as to the right of riparian owners to discharge foul matter into streams is substantially the same as in England,[7] and the prescriptive period for acquiring an absolute right to poison the waters is forty years.[8]

There is also an enactment in the Nuisances Removal

[1] *Ante*, p.

[2] See § 22.

[3] 25 & 26 Vict. c. 97, § 12. See the similar section of the English Act, *ante*, p.

Ante, p.

[5] Ibid, § 34.

[6] 25 & 26 Vict. c. 97, § 13.

[7] See *ante*, p.

[8] Miller, M. 12823; Russell, M. 12823, 3 Paton. 403; Darnie, 4 S. D. 167; Dun, 15 S. D. 858. *Montgomerie* v. *Findlay*, 15 D. B. M. 853; *Ewen* v. *Guthrie*, 10 D. B. M. 513.

Scotland Act,[1] as to fouling rivers with gas washings, dye-stuffs, &c.

Duties of Fishery Commissioners—The Fisheries Commissioners are bound to visit and report on each river and estuary of Scotland, after giving notice by advertisement in the local newspapers.[2] They were also bound, before 1st January, 1863, to make bye-laws, fixing the limits of estuaries, and the point of each river where upper proprietors are divided from the lower proprietors, due notice being given in the local newspapers, and after the bye-laws are made, and approved of the Home Secretary, they shall be published in the *Edinburgh Gazette*, and other newspapers to be appointed by the Home Secretary.[3] The Commissioners are also to make bye-laws as to the other matters specified in the sixth section of the statute, such as the close season, the use of cruives, &c.[4] but the time for doing so has been extended by 26 & 27 Vict. c. 50, § 1, until 1st January, 1866. Before making such bye-laws, the Commissioners must give due notice to each district board, so as to allow the latter an opportunity of being heard on the subject; and when the bye-laws are made, they are to be sent to the sheriff's clerk, who is to publish them in the local newspapers. An opportunity of four months is given to persons interested, to make representations to the Home Secretary, and when approved, they are to be published in the *Edinburgh Gazette*, and in such other modes as the Secretary of State may direct. One of these other modes ought to be the painting of

[1] 19 & 20 Vict. c. 103, § 19.
[2] Ibid, § 14.
[3] Ibid, § 15.
[4] See *ante*, p. .

these bye-laws on a board, like a table of turnpike tolls, which may be fixed in the market-place, or other public place of resort, in all the towns and villages of the district, so that random fishermen, as well as residents, may have a ready mode of ascertaining points of such essential importance in the pursuit of fishing.

The Fishery Commissioners have power to compel the attendance of witnesses before them, in the same way as courts of justice.[1]

Fishery District Boards.—Within three months after the bye-law of the Commissioners has fixed a district, the roll of proprietors is to be made up by the sheriff's clerk, who is to call a meeting.[2] The qualification of an upper proprietor is the property of a fishery valued at 20*l.* and upwards, or of half-a-mile of frontage to the river or a tributary thereof, with a right of salmon fishing; the qualification of a lower proprietor is the property of a fishery valued in the valuation roll at 20*l.* and upwards. The sheriff is to decide the qualification in case of dispute. The upper proprietors are to meet and elect not more than three of their number to be members of the district board, and the lower proprietors are to do the same. In voting on this occasion, any proprietor of a fishery valued at more than 500*l.* is to have one vote for every 500*l.* and a fraction of that sum, but not more than four votes in all. These two sets of elected members, together with the largest proprietor in value, who is the chairman, with a casting vote, constitute the district board. The board is to meet within ten days after their first elec-

[1] Ibid, § 17. [2] 25 & 26 Vict. c. 97, § 18.

tion.[1] And then the sheriff's clerk is to give notice of the time of the first meeting, which may be held any time within twenty-one days after the first election.[2] If in the upper or lower division the number of proprietors is less than three, then the board is to consist of an equal number from each division, presided over by the largest proprietor as chairman; if the largest proprietor be the sole upper or sole lower proprietor, he is to have two votes, and if there be only one proprietor in a fishery district, he is to have all the powers of a board.[3] A mandatory, appointed in writing, may act for the proprietor.[4] The sheriff's clerk is to be paid a reasonable remuneration by the district board.[5] The district board may sue and be sued in the name of their clerk (who need not be the sheriff's clerk, there being power to appoint any other person clerk.[6] If the board consist of more than six members, three shall form a quorum; if less than six members, two shall form a quorum.[7] The district board continues in office for three years, but the members may be re-elected.[8]

Powers of District Board.—The district board is to have powers subordinate to the Fishery Commissioners, and these are confined chiefly to details of administration, such as appointing and removing constables, water-bailiffs, watchers, and similar officers; they may make arrangements with other district boards to keep a staff of officers in common, or with the police com-

[1] 25 & 26 Vict. c. 97, § 22.
[2] 26 & 27 Vict. c. 50, § 2.
[3] Ibid, § 19.
[4] Ibid, § 20.
[5] Ibid, § 21.
[6] Ibid, § 22.
[7] Ibid, § 22.
[8] Ibid, § 24.

mittee of the county, for the payment of extra constables. But though the district board may "alter from time to time regulations for the preservation of the district fisheries, such regulations, besides requiring for their validity the approval of the Secretary of State, shall not interfere with any vested right of property, and shall not authorize any encroachment or trespass on private property.[1] The approval of the Home Secretary, though necessary, does not in any way affect the validity of such regulations, which depends not on the views of the Home Secretary, but upon the law of the land. The district board, for example, could not alter the close time, or the size of the meshes of nets, nor authorize any of their officers to enter the land of any proprietor for detective purposes. Whether a particular proprietor is entitled to fish in a particular way, is a question of law, and not within the scope of the determination of any district board, or even of the Commissioners themselves, whose powers are subject to the same limit by the sixth section. The validity of a bye-law is often a nice question of law; and any person prosecuted for a penalty imposed by any bye-law, which penalty cannot in any case exceed 2*l.*[2] may set up as a defence that the bye-law is illegal.

Assessments by District Boards.—The mode in which a district board raises the funds to pay the sheriff's clerk, their own clerk and officers, is by assessing the proprietors of fisheries according to their value in the Valuation Roll.[3] If a fishery is not valued in the

[1] 25 & 26 Vict. c. 97, § 22. [2] Ibid, § 25.
[3] Ibid, § .

Valuation Roll, but the proprietor claims to vote in the election of members of the board, then his fishery shall be taken to be of the value of 20*l.* In assessing the fishery proprietors the board has all the powers of Commissioners of Supply, and are to proceed in the way pointed out by 20 & 21 Vict. c. 72: that is to say, the assessment is payable for the period from Whitsunday to Whitsunday, and may be levied either on the proprietor or tenant; but if the tenant pay the assessment he may deduct the amount from his rent.[1] A summary warrant may be issued for recovery of the assessment.[2] Any dispute between the fishery board and the party assessed, as to the assessment, is to be settled by the sheriff on a written petition of either party, and his decision shall be final.[3]

Seizure of Forfeited Articles.—Wherever the Salmon Fishery Act directs any net, rod, line, or other article to be forfeited the same may be seized by any constable, water-bailiff, watcher, or officer, and the sheriff or Justice may order it to be destroyed or sold, and the proceeds paid to the clerk of the board.[4] The articles which are declared to be forfeited are "every boat, net, rod, line, or other article used for taking salmon, and found in possession of the party at the time of the committing of the offence." The property is not forfeited until a conviction takes place; but an inchoate forfeiture takes place when the offence is committed, and power is hereby expressly given to certain persons to seize the above articles of property in certain circum-

[1] 20 & 21 Vict. c. 72, § 29.
[2] Ibid, § 32.
[3] Ibid, § 33.
[4] 25 & 26 Vict. c. 97, § 27.

stances. The power being in derogation of the common law must be strictly construed. It is only constables, water-bailiffs, watchers, or other officers appointed by the district board who can seize the things, and no other persons can do so. Even the owner or lessee of the fishery has no power to make the seizure. Moreover, the articles can only be seized on the spot where the offence is being committed, and when they are in the poacher's possession, and hence if the poachers escape no seizure can be made.[1] The salmon caught are not forfeited by this Act; but by the 9 Geo. IV. c. 39, § 2, if salmon are caught during close time, whether by a poacher or not, they are forfeited. If the Justice before whom the offender is brought, or sheriff, so order, the forfeited property may be destroyed or sold; but if he make no order, it belongs to the constable, &c. seizing.

Three or more Poaching Salmon at Night.—Where three or more persons in concert illegally fish by night, *i.e.* between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, in any river, or estuary, or the sea, they are liable to a fine of 5*l.* each, or to imprisonment for three months, according to the discretion of the Justice or sheriff.[2] This enactment applies to the Tweed Fisheries.[3] The enactment resembles a similar enactment as to poaching game by night.[4]

Procedure to recover Penalties.—The clerk of the dis-

[1] See Paterson's Game Laws, as to similar enactments, 64, 94.
[2] 25 & 26 Vict. c. 97, § 27.
[3] Ibid, § 34.
[4] See Paterson's Game Laws of the United Kingdom, p. .

trict board or any other person may prosecute offences under this Act, and the Sheriff or two Justices of the place where the offence was committed have jurisdiction. The convicted party may appeal, on finding security for costs and penalty, to the Court of Justiciary, under 20 Geo. II. c. 43, but there is no advocation allowed.[1] The Sheriff may enforce specific performance of any bye-law of the Commissioners or district board.[2] The party proceeded against may be ordered to pay the prosecutor's costs.[3] The penalties shall be paid to the clerk of the district board if he is the prosecutor, towards defraying the board's expenses; and, if otherwise, to be applied as the Justices or Sheriff shall direct.[4]

Poachers of Salmon.—The general offence of poaching salmon is punished by 7 & 8 Vict. c. 95, § 1, which, not being superseded by any similar enactment in the Salmon Fisheries (Scotland) Act, 1862, is still in force.[5]

[1] 25 & 26 Vict. c. 97, § 28. [2] Ibid, § 29.
[3] Ibid, § 30. [4] Ibid, § 32.
[5] "If any person not having a legal right or permission from the proprietor of the salmon fishery shall from and after the passing of this Act wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take, in or from any river, stream, lake, water, estuary, firth, sea loch, creek, bay, or shore of the sea, or in or upon any part of the sea, within one mile of low-water mark, in Scotland, any salmon, grilse, sea trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay a sum not less than ten shillings and not exceeding five pounds for each and every such offence, and shall, if the Sheriff or Justices shall think proper, over and above, forfeit each and every fish so taken, and each and every boat, boat tackle, net, or other engine used in taking, fishing for, or attempting to take fish as aforesaid; and it shall be lawful for any person employed in the execution of this Act to seize and detain all fish so taken, and all boats, tackle, nets, and other engines so used, and to give in-

The statute 7 & 8 Vict. was itself an amendment of the 9 Geo. IV. c. 39, § 3, which was defective, and is impliedly repealed by this enactment. By this enactment a person who fishes in another's fishery for salmon incurs a penalty "unless he has a legal right or permission." In order to ascertain whether he has a legal right it is to be recollected that though all salmon fisheries in Scotland belong either to the Crown or to a grantee of the Crown this doctrine applies only to salmon fishing with the net and coble and other higher rights. But as regards rod-fishing no grant of the Crown is necessary, for it is an incident of the property of the soil, and is one of the riparian rights. Therefore whoever is a riparian owner at the point in question has a legal right to angle for salmon there, though the net and coble fishing belongs to the Crown and its grantees. If there is no legal right in the above sense, then permission from the proprietor is necessary not only to fish salmon with the net and coble, but even with the rod.

formation thereof to the Sheriff or any Justice of the Peace, and such Sheriff or Justice may give such orders concerning the immediate disposal of the same as may be necessary."—7 & 8 Vict. c. 95, § 1.

"The regulations as to the recovery and application of penalties and the apprehension of offenders, and all other enactments and provisions of the Act 9 Geo. IV. c. 39, shall extend and apply to what is herein above enacted, and this Act shall be construed and applied in the same manner and in all respects as if it had formed part of the said recited Act."—Ibid, § 2.

"Nothing herein contained shall be construed as depriving any proprietor of salmon fishery of any right now by law vested in such proprietor to prevent any person from fishing either within or beyond the limits specified in the Act."—Ibid, § 3.

"Nothing herein contained shall affect the rights or property of the Crown."—Ibid, § 4.

The permission need not be in writing, but must be clearly proved.[1] And it must be obtained beforehand from the owner of the fishery, for in a similar enactment as to the Game Laws[2] it has been held that no *ex post facto* sanction or ratification of the owner after he hears of the illegal fishing will purge the offence.[3] Therefore, where a person goes to fish in another's fishery for salmon without previously obtaining express permission from the owner, however well-founded may be his belief that the owner if asked would not refuse, commits this offence.[4] It is true that in 1 & 2 Wm. IV. c. 32, § 30, the word "wilfully" is not inserted, but that word in reality means only knowingly, *i.e.* with knowledge that the fishery belongs to another, and therefore the enactment is substantially the same as the present. The penalty, however, is only incurred in rivers, streams, &c. and not in the sea, except it be within one mile of low-water mark. Therefore, a person may fish with nets for salmon at a greater distance than a mile from the sea-shore without committing any criminal offence under this section, though he may be liable to a civil action of damages.

According to the construction given to similar enactments a person can only be convicted of one offence on one day, however numerous may be the acts of poaching on that day.[5]

Apprehension of Poachers of Salmon.—Any person

[1] *Easton* v. *List*, 1 Browd. Just. C. 95.
[2] 1 & 2 Will. IV. c. 32, § 30; Paterson's Game Laws, p. 56.
[3] *Morden* v. *Porter*, 7 C. B. N.S. 88.
[4] Ibid.
[5] See *ante*, p. .

may, without a warrant, seize and detain a poacher.[1] In order to justify the apprehension of a poacher, he must be found in the act of committing the offence, and on the spot where he offended. If he escape from the spot, and an interval of time has elapsed, the power to apprehend is gone, though it seems a poacher may, if found committing the offence, and then taking to flight, be pursued and seized, *flagrante delicto*. When seized the poacher must be taken before a Justice of the Peace with reasonable promptitude, and the apprehender may leave the poacher in the hands of the constable while he goes in search of the Justice, and no complaint or information is necessary in such a case.[2]

Procedure and Penalties for Poaching.—The prosecution for penalties must be commenced within six calendar months after the offence was committed; and a conviction under the statute is complete satisfaction, and a bar of other proceedings.[3] Justices may act though interested in the fishery, if he or his tacksmen are not parties to the proceeding.[4] The penalty for poaching salmon shall go to the informer.[5] The party

"And be it further enacted, That it shall be lawful for any person, without any warrant or other authority than this Act, *brevi manu*, to seize and detain any person who shall be found committing any offence against this Act, and to carry such person before any Justice of the Peace or other Magistrate, or to deliver such person to a constable, who is hereby required to carry such person before a Justice of the Peace or Magistrate, who shall forthwith examine and discharge, or commit such person until caution *de judicio sisti* be found, as the case may require."—9 Geo. IV. c. 39, § 11.

[2] *Evans* v. *Macloughlen*, 4 Macq. Ap. C.

[3] 9 Geo. IV. c. 39, § 13.

[4] Ibid, § 12.

[5] Ibid, § 9.

convicted may appeal to the Circuit Court of Justiciary.[1]

[1] "Provided always, and be it enacted, That each and every penalty provided by this Act shall go to the informer, and may and shall be recoverable, with expenses, as well before the Sheriff as before the Justices of the Peace of any county as aforesaid wherein the same may be incurred, or where the offender shall reside, at the instance of any person or persons who shall prosecute for the same; and in prosecutions for the different penalties imposed by this Act, or any other Act for the preservation of the salmon fisheries in Scotland, it shall be lawful for the Sheriff or Justices before whom any complaint for the recovery thereof may be brought, to proceed in a summary way, and to grant warrant for bringing the parties complained upon immediately before them, and on proof on oath by one or more credible witnesses, or confession of the offence, or other legal evidence, forthwith to determine and give judgment in such complaint, without any written pleadings or record of evidence, and to grant warrant for the recovery of all penalties and expenses decerned for, failing payment within fourteen days after conviction, by poinding and imprisonment, for a period, at the discretion of the Sheriff or Justices, not exceeding six months, it being hereby provided that a record shall be preserved of the charge and of the judgment pronounced; and any person or persons who shall think himself, herself, or themselves aggrieved by any judgment of any Sheriff or Justices, pronounced in any case arising under this Act, or by assessment made under this Act, in Scotland, may appeal to the Commissioners of Justiciary at their next Circuit Court, or where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions contained in the Act passed in the twentieth year of the reign of King George the Second, for taking away and abolishing the heritable jurisdictions in Scotland; with this variation, that such person or persons shall, in place of finding caution in the terms prescribed by the said Act, be bound to find caution to pay the penalty or penalties, and expenses, awarded against him, her, or them by the sentence or sentences appealed from, in the event of the appeal or appeals being dismissed, together with any additional expenses that shall be awarded by the Circuit Court on dismissing the said appeal or appeals; and it shall not be competent to appeal from or bring the judgments of any Justices or Sheriff acting under this Act under review, by advocation or suspension, or by reduction, or in any other way than as herein provided."—9 Geo. IV. c. 39, § 9.

The conviction for contravention of 9 Geo. IV. c. 39 being of a penalty in the nature of criminal process, the defender may be im-

prisoned for non-payment, though the sum is under 8*l.* 6*s.* 8*d.* *Lawson* v. *Jepp*, 16 Feb. 1853.

The complaint is not too vague if it describe the fishing to be in the river *S* in the parish of *A*, though there are three miles of such river in the parish; and the Court will not quash a conviction, though it do not set forth that it proceeded on the oath of a credible witness. *Bennet* v. *Hunling*, 6 Feb. 1860, Just. C. 32 J. P. 476.

The appeal from a conviction must be to the next Circuit Court of Justiciary. *McPhail* v. *Campbell*, 18 Mar. 1861, Just. C., 33 Sc. Jur. 388.

CHAP. IV.

TROUT AND FRESHWATER FISH OTHER THAN SALMON.

COMMON LAW AS TO TROUT FISHING—FISHING TROUT WITH NETS—RIGHT OF TROUT FISHING—LEGAL MODES OF FISHING TROUT BEFORE 1860—RIGHT OF TENANTS TO FISH TROUT—CLOSE TIME—TRESPASSING TO FISH TROUT—POWER TO SEIZE NETS OF POACHERS—POWER TO APPREHEND POACHERS—JUSTICES INTERESTED—PROCEDURE AGAINST POACHERS.

Common Law as to Trout Fishing.—The common law of Scotland, as already stated, makes this distinction between salmon and all other kinds of fish, that, whereas it is an incident of the ownership of land or one of the riparian rights to catch all other fish, and in navigable rivers and the sea the public may also catch all other fish, yet in order to fish for salmon with nets, either in a river or the sea, a grant from the Crown must be shown; and even as regards salmon it is only the right of catching them with nets or cruives, or what is called a higher right than net fishing, that requires to be derived from the Crown. It follows that rod fishing for salmon does not in any way depend on a Crown grant, but passes with the *dominium utile* of the lands,

On the same principle trout fishing passes as one of the incidents of ownership and as a riparian right. But statutes have passed which vary in some respect the ordinary common law as to trout and other freshwater fish. And it may be well first to state the statutory restrictions put on fishing for trout and freshwater fish with nets and otherwise than by netting.

Fishing Trout with Nets, &c.—The statute 23 & 24 Vict. c. 45, § 1 imposes a penalty on all who poach trout or other freshwater fish.[1] By this section, and the inter-

[1] "Whereas by the Act 8 & 9 Vict. c. 26, intituled *An Act to prevent fishing for trout or other freshwater fish by nets in the rivers and waters in Scotland*, provision is made for preventing the destruction of trout and other freshwater fish by nets in the rivers, waters, and lochs of Scotland: And whereas there are various other ways by which trout and other freshwater fish may be destroyed which have not yet been declared illegal: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

"That it shall not be lawful for any person whatsoever (except as herein-after provided), at any time after the passing of this Act, to fish for trout or other freshwater fish in any river, water, or loch in Scotland, with any net of any kind or description, or by what is known as double rod fishing, or cross line fishing, or set lines, or otter fishing, or burning the water, or by striking the fish with any instrument, or by pointing, or to put into the water lime or any other substance destructive to trout or other freshwater fish with intent to destroy the same; and if any person shall wilfully take, fish for, or attempt to take, or aid and assist in taking or fishing for, or attempting to take or fish for, in or from any such river, water, or loch, any trout or other freshwater fish by or with any net of any kind or description, or by double rod fishing, or cross line fishing, or by set lines, or otter fishing, or by burning the water, or striking the fish with any instrument, or by pointing, or by putting into the water lime or any other substance destructive to trout or other freshwater fish with intent to destroy the same, such person shall forfeit and pay any sum not exceeding five pounds for every such offence, besides forfeiting the trout or fish taken, and also every boat or net, tackle, instrument, or other article in or by

pretation clause, sect. 9, the prohibition against fishing for trout with the means described extends to almost every piece of water which trout frequent. As, however, at common law all these modes (except, perhaps, that of poisoning with lime) was competent, the statute must be strictly construed, and the modes of fishing specified, and those only will be held illegal. Hence, for example, catching fish with the hand is not a penal offence. The offence also is prohibited by very extensive words, "fishing for, taking, or attempting to take;" and hence in order to commit the offence it is not necessary that any fish be actually taken.

According to the ordinary construction put on similar language it seems that only one offence will be committed on one day, however numerous may be the distinct attempts to fish.[1] The fish caught, as well as the nets, &c. are forfeited. Rods are included, but not a fishing basket. The forfeiture is incurred only after conviction; and the Sheriff or Justice has power to dispose of the forfeited property. If the property forfeited is not disposed of, it seems to belong to the party authorized to seize under the third section, for seizure implies the right of property as well as possession.

Right of Trout Fishing.—The proviso at the end of the section saves from the penalty all those "who have

which the same may have been taken or attempted to be taken, and shall also pay the full expenses of the conviction: Provided that nothing in this Act contained shall prevent any person having the right to fish in any river, water, or loch in Scotland, or any person having permission from such person, from exercising the right of fishing in such river, water, or loch in any mode not prohibited by law prior to the passing of this Act."—23 & 24 Vict. c. 45, § 1.

[1] See *ante*, p. .

a right to fish in any river in any mode not already prohibited." The question arises, therefore, (1) Who are those who have a right to fish generally by all legal modes? (2) What modes are illegal by other laws in force before the passing of this Act?

What were Legal Modes of Fishing Trout before 1860.—The right of fishing at common law is one of the riparian rights of owners, for fishing is merely one of the uses of water. There is, however, no restriction placed upon the riparian owner as to the mode of fishing, unless such mode is a violation of the maxim *sic utere tuo ut non alienum lædas.* So long as a riparian owner does not exercise his right in such a way as to prevent his neighbour getting any similar use of the stream, he is beyond the reach of the law. Thus, erecting a wear is obviously illegal in this sense; and poisoning a stream with lime or other noxious material, so that the poison flows downwards and kills the fish in the lower proprietor's water, is, as against the latter, obviously illegal at common law. But merely fishing with nets, spearing, churning the water, and other modes mentioned in this statute, are all competent at common law, for they are only different means of exercising the right of fishing, which do not substantially prevent the neighbouring riparian owners from acting in the same way, or in any other way competent. Therefore, so far as the mere machinery of catching fish does not sensibly prevent other riparian owners from catching in the same way, there seems to be no restriction at common law, except in the case of wears or poisoning the water.

Right of Tenants of Land to Fish Trout.—The next question is, Who is the person who has the legal right of fishing for trout generally, *i.e.* with nets and other competent means? The answer is, that all riparian owners have this right as an incident of ownership. Where the owner has, however, let the land to a tenant, the question may arise, whether the owner or the tenant is to enjoy the trout fishing. If the lease expressly let the fishing to the tenant, there is an end of the question; but the difficulty arises whether, when the lease is silent, the right of fishing is in the tenant also. On this subject there is an authority.

The Duke of Richmond granted a lease of the farm of Pitscurly, in Aberdeenshire, to Dempster.[1] A stream, called the Deveron, runs through the farm, and nothing was said in the lease about fishing. Dempster having fished the trout in this stream with a net, he was proceeded against by the Duke under the stat. 8 & 9 Vict. c. 26, for a penalty, and the same language is used in the 23 & 24 Vict. c. 45 § 1. It was admitted that the whole question turned on whether the tenant came within the words of the statute, which exempted from its provisions "all persons having a right to fish for trout or other freshwater fish." If he had a right as tenant, then he was not liable to the penalty. The Court of Justiciary, consisting of five Judges, per Inglis, C. J. came to the following conclusion: "We are of opinion that an agricultural tenant has not, as such, any right to fish in a stream running by or through his farm with any net of

[1] *Duke of Richmond* v. *Dempster*, 14 Jan. 1860, Just. C. 33, Sc. Jur. 133.

any kind or description. And, being of that opinion, we think it quite unnecessary to go further for ground of judgment, whether an agricultural tenant, as such, may have any right to angle or not, or to fish in any other way for freshwater fish is not *locus loci*, because the statute deals entirely with net fishing, and contemplates no other kind of fishing. And therefore our ground."

This Decision Questioned.—This decision clearly enough states the law to be, that in agricultural leases, where nothing is said, the landlord and not the tenant has the right to fish for trout with nets. But as the judgment refers to no authority and states no reason, it cannot be held conclusive if it is inconsistent with sound principle, and accordingly, if the point be again raised, it will be open to the tenant to reason thus. The right of fishing for every fish (except salmon with nets, &c.) is one of the riparian rights, being one of the natural uses of water. At common law the machinery by which other fish (than salmon) are caught is utterly immaterial, provided the neighbour's right is not prejudiced, and no one can say that net fishing, any more than rod fishing, prejudices one's neighbour. There is no magic in the word net. Now, a lease is *primâ facie* a contract by which the landlord assigns the exclusive possession of the surface of the land (which includes the use of water) to the tenant, and though there is an implied exception of the mines, the timber, and the game, yet an additional exception of the use of water has never been recognised by any authority. Therefore the landlord, if he came to fish in the stream, would be a trespasser and a poacher, and (which is the same pro-

position) the person who alone is entitled to the exclusive use of the water and of the banks of the stream, for all lawful purposes, is the tenant, for he has, by contract, all the uses which his landlord would have. In short, to draw any distinction between the legal right to catch trout with a net and with a rod is a confusion of ideas derived from the doctrine applicable to salmon, but to no other fish, viz. that net fishing of salmon is not a riparian right, but rod fishing is.

Close Time.—It may be observed that there is no close time as to trout and other freshwater fish than salmon, and therefore they may be fished all the year round, if the party has the legal right to fish.

Trespassing to Poach Trout.—All trespassers with intent to fish trout are liable to a penalty.[1] It is difficult to see what there is in this section which is not contained in the previous section; the only difference seems to be a mere change of the phrase. In the first section all persons not having the leave of the person entitled to fish, who fish, or attempt to fish, (*i.e.* all trespassers with intent to fish) are liable to the penalty; here, in terms, all trespassers with intent to fish are subject to the penalty. Both sections mean one and the same thing. The offences seem to be one and the same, and therefore it is not to be supposed that two

[1] "If any person shall trespass upon any ground, enclosed or unenclosed, or in or upon any river, water, or loch, with intent to take any trout or other freshwater fish, with any net, double rod, cross line, set line, or otter, or by burning the water, or by striking the fish with any instrument, or by pointing, or to destroy the fish by putting lime or other substance destructive to trout or other freshwater fish into the water, such person shall forfeit and pay a sum not exceeding five pounds for every such offence."—23 & 24 Vict. c. 45, § 2.

prosecutions under these sections can be made out of the same *species facti*. If it be possible to show they are distinct, and in that case only, then the poacher can be proceeded against under both sections.

Power to Seize Nets, &c. of Poachers.—A special power is given by the Trout Act to seize boats, nets, &c. of poachers.[1] This statutory power to seize or confiscate the nets, &c. of poachers is necessary, for at common law the party entitled to the fishings is not entitled to seize the boat and net of the trespasser.[2] This power, therefore, being in derogation of the common law, must be strictly construed, and the only person entitled to seize the boat, nets, &c. is the proprietor of the land on which the water poached is situate, or some one having the authority of such proprietor, which authority need not be in writing. But following the construction given to the Game Acts, the implements can only be seized on the spot, and if they are being used at the time on such spot.[3] It seems to be unnecessary to make a previous demand for the implements, or to give notice before seizing them;[4] but no more violence is

[1] It shall be lawful for any person, having the authority of the proprietor of land through or past which the river or water flows, or upon which the loch is wholly or partially situate, to seize and detain any boat or net of any description, double rod, cross line, set line, or otter, or materials for burning the water, or instruments for striking the fish, or for pointing, or lime or other substance destructive to trout or other freshwater fish, used or intended to be used in the commission of any such offence, and also any fish taken by any such offender, and to give information thereof to the Sheriff or Justice of the Peace."—23 & 24 Vict. c. 45, § 3.

[2] *Ashburton* v. *Mackenzie*, 7 S. D. 849.

[3] See Paterson's Game Laws, 94.

[4] Ibid. 95.

to be used in taking them than what is absolutely necessary. The statute 8 & 9 Vict. c. 26, which, though in many respects repealed in this Act of 23 & 24 Vict. c. 45, is not repealed, except where inconsistent; and it contains a clause (sect. 3) which states that "if any such trespasser shall have in his possession any net of any description whereby trout or other freshwater fish may be taken or killed, the possession thereof shall be held to be sufficient evidence of the intent of such trespassers to commit such offence." As the statute 8 & 9 Vict. c. 26 only applied to fishing illegally with a net, this enactment will only apply to net fishing, for the two statutes are not to be read together as one act. The section, however, seems scarcely to confer greater weight to the evidence than would be given to it without such enactment.

It is for the Sheriff or Justice to give orders what is to be done with the boat, nets, &c.[1]

Power to Apprehend Poachers.—The statute 23 & 24 Vict. c. 45, contains no section giving power to anybody to apprehend, *brevi manu*, poachers, though found in the act of poaching; and no power exists at common law. But the Act 8 & 9 Vict. c. 26, § 4, gives such a power, and not being repealed, that statute may be made available to justify an arrest of poachers if they are net fishing but not otherwise, for the Act 8 & 9 Vict. c. 26, applied only to net fishing. The 8 & 9 Vict. c. 26, § 4, enacts, "it shall be lawful for any person, without any warrant or other authority than this Act, *brevi manu*, to seize and detain any person who shall be found com-

[1] See § 5, *post*.

mitting any offence against this Act, and to carry such person before the Sheriff or any Justice of the Peace in the county within which the offence shall take place, or to deliver such person to a constable, who is hereby required to carry such person before such Sheriff or Justice; and the Sheriff or Justice of the Peace before whom such offender shall be brought, shall forthwith examine, and discharge or commit such offender until caution, *de judicio sisti*, be found, as the case may require." In consequence of these two Acts, 8 & 9 Vict. c. 26 and 23 & 24 Vict. c. 45, existing together, the latter not repealing the former, nor yet containing any clause stating that they shall be read as one Act, it follows that poachers who are net fishing can be apprehended by any person, without a warrant, and taken before a Justice, but poachers by double rod fishery, &c. cannot be so arrested by any body, even by the owner of the fishery.

Justices Interested in the same Water.—It is no disqualification of the Justices that they are interested in the water, if they are not directly interested as owners or landlords.[1]

[1] "All Justices of the Peace shall and may act in the execution of this Act notwithstanding that such Justices shall be the proprietors of land through or past which any river or water may flow, or upon which any loch may be wholly or partially situated, or shall otherwise have a right of trout or freshwater fishing in any such river, water, or loch, except in cases in which the offence has been committed on the property of such Justice, or in which such Justice is a party to the prosecution of the case, or is directly interested in the result thereof: and no such proprietor or party having right as aforesaid shall be incompetent as a witness to prove any offence committed against this Act by reason of his being such proprietor or having such right."—23 & 24 Vict. c. 45, § 4.

Procedure against Poachers of Trout.—The mode of procedure against poachers of trout is given in the statute 23 & 24 Vict. c. 45, § 5, *et seq.*[1]

[1] *Recovery of Penalties.*—"And for the recovery of the penalties and forfeitures imposed by this Act, be it enacted, That any such penalties or forfeitures may be recovered by summary proceeding upon complaint in writing made by the Procurator Fiscal or by any party prosecuting for the same to the Sheriff or any Justice of the Peace for the County in which such offence shall be committed, or to the Sheriff or any Justice of the Peace for any County in which the offender may be found, and on such complaint such Sheriff or Justice of the Peace shall issue a warrant for bringing the party complained against immediately before him, or shall issue an order requiring such party to appear at a time and place to be named in such order; and every such order shall be served on the party complained against by any county officer, either by delivering to such party personally or by leaving with some inmate at his usual place of abode a copy of such order, and of the complaint whereon the same has proceeded; and either upon the appearance or the default to appear of the party complained against, it shall be lawful for the Sheriff or Justice to proceed to the hearing of the complaint; and upon proof of the offence, and without any written pleadings or record of evidence to convict the offender, and upon such conviction to decern, adjudge, and sentence him to pay the penalty or forfeiture incurred, and the expenses attending the conviction, and to grant warrant for imprisoning him until such penalty or forfeiture and expenses shall be paid; Provided always that such warrant shall specify the amount of such penalty or forfeiture and expenses, and shall also specify a period at the expiration of which the party shall be discharged, notwithstanding such penalty or forfeiture and expenses shall not have been paid, and which period shall in no case exceed two months; and it shall be lawful for the Sheriff or Justice to make such orders concerning the immediate disposal of any boat, net, double rod, cross line, set line, or otter, or materials for burning the water, or instruments for striking the fish, or for pointing, or lime or other substance destructive to trout or other fresh-water fish, or fish seized or forfeited under the provisions of this Act, as may be necessary."—23 & 24 Vict. c. 45. § 5.

Appeal.—"It shall be lawful for any person who shall think himself aggrieved by any judgment of the Sheriff or Justice of Peace pronounced in any case arising under this Act to appeal from the same to the next Circuit Court of Justiciary, or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, in the manner

and by and under the rules, limitations, conditions, and restrictions contained in an Act passed in the twentieth year of the reign of his Majesty King George the Second, for taking away and abolishing heritable jurisdiction in Scotland, with this variation, that such person shall, in place of finding caution in the terms prescribed by the said Act, be bound to find caution to pay the penalty or forfeiture and expenses awarded against him by the sentence appealed from in the event of the appeal being dismissed or not insisted in, together with any additional expenses that may be awarded by the Court on deciding or dismissing the appeal; and it shall not be competent to appeal from or bring the judgment of any Sheriff or Justice of Peace acting in the execution of this Act under review, by advocation or suspension or by reduction, or in any other way than as herein provided."—Ibid. § 6.

Application of Penalties.—"All penalties and forfeitures imposed under the authority of this Act shall, when levied, be paid, the one half thereof to the prosecutor and the other half to the inspector of the poor of the parish within which the offence shall have been committed, on behalf of such poor."—Ibid. § 7.

Limitation of Actions.—"No prosecution or other proceeding whatever shall be brought or commenced against any person for any offence against this Act, unless the same shall be commenced within three months after such offence shall have been committed."—Idid. § 8.

Interpretation of Terms.—"The words 'river,' 'water,' or 'loch' occurring in this Act shall mean and include any stream, burn, mill-pool, mill-lead, milldam, sluice, pond, cut, canal, and aqueduct, and every other collection or run of water in which trouts and other fresh-water fish breed, haunt, or are found or preserved; the word 'Sheriff' shall mean the Sheriff or Steward of the county in which the offence happens or case arises, and shall include the Sheriff-substitutes of such Sheriffs; the expression 'Justice of the Peace' shall mean a Justice of the Peace of the county in which the offence happens or case arises; and the expression 'county officer' shall mean and include sheriff's officer, constable, or any officer of the county police force."—Ibid. § 9.

Act does not apply to Salmon.—Nothing herein contained shall affect any Act of Parliament, general or local, passed for the preservation of the salmon fisheries in Scotland, or in relation to the fishing of salmon or fish of the salmon kind in Scotland."—Ibid. § 10.

Act does not apply to Angling of Trout.—Nothing herein contained shall affect or apply to the killing of trout or other freshwater fish with single rod and line which shall be regulated by the laws in existence prior to the passing of this Act."—Ibid. § 11.

CHAP. V.

THE LAWS OF ANGLING.

ANGLING GENERALLY—ANGLING FOR SALMON—ILLEGAL ANGLING FOR SALMON—ANGLING IN ANNUAL CLOSE TIME—IN WEEKLY CLOSE TIME—SALMON-ROE—SELLING SALMON ANGLED—TITLE TO TROUT FISHING—ANGLING FOR TROUT—ANGLING TROUT FROM HIGHWAY—TROUT ANGLING AS REGARDS SALMON—ANGLING AS BETWEEN OPPOSITE OWNERS OF STREAM.

Angling generally.—The nature of the right of angling is the same in Scotland as in England; it is a right belonging to a riparian owner as an incident of his ownership, and therefore there is no such thing as a public right of angling in any private stream or river.[1]

Angling for Salmon.—The right of angling for salmon does not, like the right of fishing salmon with nets, depend on a grant from the Crown, but it is an incident of property, and one of the riparian rights. The Crown can in general neither give nor take away the right of angling;[2] therefore even though another person has a grant from the Crown of the salmon fishing at a particular part of the river, yet the owner of the banks may fish salmon with the rod, provided his doing so

[1] See *ante*, p. .

[2] See *ante*, p. .

does not substantially interfere with the higher right of the Crown grantee.[1] But the grantee of the net fishing may have acquired by long user the right of the rod fishing also, if he has always exclusively exercised that right.

Illegal Angling for Salmon.—As a general rule, the offence of illegal angling for salmon, wherever it is made a penal offence, is not so heavily punished as fishing with nets; and in some cases it is exempt from punishment altogether.

Angling in Annual Close Time as to Salmon.—The Commissioners of Scotch Salmon Fisheries have power to specify in their bye-laws during what part of the annual close time anglers for salmon, if otherwise entitled to fish, may do so without incurring a penalty.[2] The penalty for angling for salmon during the annual close time is 5*l.* and 2*l.* for every salmon so taken or killed.[3]

There is no close time, either annually or weekly, as to trout or other freshwater fish.

Weekly Close Time as to Salmon.—With regard to the weekly close time, persons may angle for salmon during the Saturday and Monday, but if they angle for salmon during the Sunday, they incur a penalty of 5*l.* and 2*l.* for every salmon caught.[4] If the angler accidentally

[1] See *ante*, p. .

[2] 25 & 26 Vict. c. 97, § 6, *ante*, p. . No bye-law having been yet issued, the old law remains in force, viz. that no one can angle for salmon between 14th September and 1st February exclusive, 9 Geo. IV. c. 39, § 2.

[3] 25 & 26 Vict. c. 97, § 11, *ante*, p. .

[4] 25 & 26 Vict. c. 97, § 11.

take an unseasonable or foul salmon, he is, of course, not liable to the penalty, but he must not keep it in his possession.[1] Whenever the angler is angling at an illegal time, he forfeits his rod and line;[2] and it may be seized by any constable or water-bailiff, subject to the disposal of it by the Sheriff or Justice.[3]

Salmon Roe.—If the angler use, or has in his possession, salmon roe for the purpose of fishing, he incurs a penalty of 2*l.* besides forfeiting such salmon roe.[4]

Selling Salmon Angled.—Though it is intended that the angler may, when the Commissioners issue their bye-laws, angle salmon during part of the annual close season, yet it will be illegal for him to sell the fish so caught, for the Commissioners have no power to alter the law as to the sale of fish in close time.[5] The penalty for selling is 5*l.*;[6] but the angler is not prohibited from giving the angled salmon as a present.[7]

Title to Trout Fishing.—The right to fish trout *ex adverso* of one's lands, as already mentioned, is a right incidental to the property of the adjacent soil, and requires no proof of forty years' possession to support it. The only qualification is that it must be so exercised as not to injure unnecessarily the salmon fishing, if any.[8] Lord Glenlee observed: The right of common fishing is accessory to lands, whether expressed in the titles or not; while, on the other hand, though a party has an express right in his titles, unless he prove that he has

[1] 25 & 26 Vict. c. 97, § 11.
[2] Ibid.
[3] Ibid. § 26.
[4] Ibid. § 12; *ante*, p.
[5] Ibid. § 6.
[6] Ibid. § 11.
[7] See as to England, *ante*, p.
[8] *Mackenzie* v. *Rose*, 8 S. D. 816, 6 W. S. 31.

excluded his neighbour, such neighbour will also be entitled to fish. This is confirmed by the decision of *Scott* v. *Lindsay*.[1] But if there be nothing more than that the neighbour has not exercised his right, that will not prevent his doing it now, unless he have been excluded for forty years by the parties having an explicit grant of trout fishing.[2]

As already mentioned, the tenant of a farm, where the lease is silent on the subject, has been held to have no right to fish for trout with nets, though that decision is open to question. But the Judges who decided against net fishing expressly guarded themselves against saying that the tenant might not angle for trout.[3]

Angling for Trout, &c.—Though there is no such thing as a public right to fish for trout and other fresh-water fish in private streams, rivers, or lochs, nor a right in the public to go along the banks for that purpose, and therefore one who angles with single rod and line on land which is not his own, and without the leave of the proprietor, is a trespasser, yet such angler, though trespassing, is, by the law of Scotland, exempt from punishment by summary conviction.[4] The statutes 23 & 24 Vict. c. 45, and 8 & 9 Vict. c. 26, do not apply to single rod fishing, 23 & 24 Vict. c. 45, § 11. The only remedy of a proprietor, therefore, against the trout angler who trespasses, is to bring an action for damages for the trespass, or if the trespassers are vexatious, to

[1] M. 12771.

[2] *Mackenzie* v. *Rose*, 8 S. D. 818.

[3] See *ante*, p. .

[4] It is otherwise in England. See *ante*, p. .

apply for an interdict. But the angler can be warned off, and if he refuse, can be pushed off the land by force, with just sufficient force, and no more. The angler cannot be given into custody, nor can his rod, or his tackle, or his trout be seized and taken from him.

Angling Trout from Highway.—Though the public have scarcely gone the length of claiming the right to fish trout in a private stream, yet an attempt was once made to establish the right to fish wherever there was a public road which led along the banks of a private stream. A person damed Shireff claimed, as one of the public, to fish trout in the Tyne, which ran through Sir Charles Ferguson's estate of Hailes, and this he did on the alleged ground, that as he had got legal access to the bank of the stream, and trout were *res nullius*, therefore he could exercise the right of fishing from such highway. The Court, however, though puzzled by the novelty of the claim, held that there was no foundation for it in point of law. Lord Moncrieff said: "The water while within the grounds is the property of the owner of the banks, subject to restrictions as to conterminous owners, and perhaps subject to grants qualifying the title. But I cannot think that to use the mere right to a road for passage only, for the purpose of killing the game fowls or the game fishes by means of it, and clearly on the mere pretence of the right of passage, is a very different thing, a plain abuse of an admitted right to a purpose which is not admitted as at all belonging to it, and which the party asserting it must prove by a very different process of reasoning,

showing some ground of right altogether different from the mere power of approaching the stream where the fishes may be, or on the ground where the fowls or other game may be."[1] This decision is in accordance with what has been held in England in reference to poaching game, where a person becomes an illegal trespasser if he use the highway for poaching purposes.[2]

Trout Angling as regards Salmon.—The fishery in a river is separable into several parts, such as the salmon fishery and the trout fishery, each of which may belong, and often does belong, to a different party. In such a case the salmon fisher has no right to complain of the trout fisher (so far as angling is concerned), nor the trout fisher of the salmon fisher for fishing at any particular point, except where one purposely acts, not in the exercise of his legal right, but in order to obstruct his neighbour in the exercise of his; or as it is technically called in Scotland, if he acts nimiously. Hence where Lord Somerville was owner of the salmon fishing in a part of the Tweed, but had lands only on one side, it was held he could not prevent the owner of the lands opposite from angling for trout on his own side, in the same part of the river, who was acting *bonâ fide* in exercise of his own right of property.[3] So also where the proprietor of a salmon fishing let it, but reserved to himself, his heirs and successors, and to those having his authority, the right of angling with the rod, it was

[1] *Ferguson* v. *Shireff*, 7 D. B. M. 1363.
[2] Paterson's Game Laws, p. 55.
[3] *Lord Somerville* v. *Smith*, 22 Dec. 1859, 32 Sc. Jur. 112.

held this was competent, and that he might afterwards let the rod fishing for a rent to a third party.[1] The reservation to heirs and successors showed it was meant to be a licence of profit and not of pleasure.[2]

Angling as between Opposite Owners of Stream.—The rule is *primâ facie* that each riparian owner can fish on his own side of a stream up to but not beyond the *mediun filum aquæ.* If he go beyond this limit, he is clearly a trespasser, whether he do so with a net or a line. It is true it was recently observed by a very high authority, Lord President Macneill,[3] that he was not aware of any law which prevented a proprietor on one side from casting his line beyond the centre of the river. But that was at most an *obiter dictum*, as to which the other Judges offered no opinion, and it is opposed to the opinion of the Court in *Milne* v. *Smith.*[4] To cast a line beyond the centre, and catch a fish there, when the opposite bank belongs to a different owner, would be a trespass in the eye of the law, just as much as if the angler had gone in person and caught the fish by hand beyond the centre line. In England (and the rule must be the same in Scotland) it is settled that a person who shoots into and strikes the soil of a field with shot, though not himself corporeally entering the field, commits a civil trespass; and so where a party sends his dog into a field to fetch out a hare, though he himself did not corporeally enter the field. Such a

[1] *Gennervill* v. *Riddell*, 16 Feb. 1847, 9 D. B. M. 727.
[2] Ibid.
[3] *Lord Somerville* v. *Smith*, 22 Dec. 1859, 32 Sc. Jur. 112.
[4] 23 Nov. 1850, 13 D. B. M. 120.

trespass is a good cause of action at law, though it depends upon the language of any particular statute whether it is a penal offence; and it is not, for example, a penal offence in England, though it is a good cause of action at common law there.[1]

[1] See Paterson's Game Laws, p. 55.

CHAP. VI.

THE TWEED AND SOLWAY FISHERIES.

THE TWEED GENERALLY—SPECIAL STATUTES AS TO TWEED—TWEED COMMISSIONERS—WATER BAILIFFS—JUSTICES INTERESTED—ANNUAL CLOSE TIME—WEEKLY CLOSE TIME—HAVING OR SELLING FISH IN CLOSE TIME—REMOVAL OF BOATS, NETS, ETC. IN CLOSE TIME—FIXED NETS, DAMS, ETC.—BEATING THE WATER—STAKE AND BAG NETS—SIZE OF MESHES OF NETS—POUT-NETS AND WEAR-SHOT NETS—LEISTERS AND SPEARS—POISONING RIVER—PENALTY ON FISHERS NOT ENTITLED—FOUL OR UNSEASONABLE FISH—CLEEKS—TROUT FISHERS CATCHING SALMON—DESTROYING SPAWN—SALMON-ROE—POACHING BY NIGHT—PROCEDURE—THE SOLWAY.

The Tweed Generally.—The Tweed during part of its course forms the boundary between England and Scotland, and the line runs through the centre of the stream. If an English proprietor go beyond the middle and fish either with net or rod he commits a trespass in Scotland, and so becomes amenable to Scotch law. On one occasion an Englishman set up a right to fish with the rod beyond his centre line, and it was held that he was an intruder and a trespasser there, though he threw his line from his own side.[1]

The Tweed is not subject to the general provisions of

[1] *Milne* v. *Smith*, 23 Nov. 1850.

the Scotch statutes, "and the reasons," says Hope, L. J. C. "for not including it were plain, for if all the lower part of the river both as to close time, stake or fixed nets, cairns, and so forth, could not be subjected to Scotch law, it would only have been restricting the use of the upper part of the river prejudicially to the Scotch proprietors, and for the benefit of the lower to have extended the Scotch statutes to the Tweed."[1]

So the Solway is exempted from the Act as to cruives.

A Special Act prohibits pack-net, which includes sloop-net in part of Forth.[2]

Special Statutes as to Tweed.—The statutes which now regulate the Tweed Fisheries are the 20 & 21 Vict. c. cxlviii. and 22 & 23 Vict. c. lxx. The Acts also apply to every river, brook, or stream which flows or runs into the Tweed, and also the mouth or entrance of the said river.[4] The limits of the mouth of the Tweed were defined by 22 & 23 Vict. c. 70, § 4, but the Fishery Commissioners have power to extend these limits before 1st January, 1864, by a bye-law.[5]

Tweed Commissioners and Officers.—Every proprietor of salmon fishings in the river of the annual value of 30*l.*, or which extend half a mile in length where such fishings are only on one side of the river, or a quarter

[1] *Mline* v. *Smith*, *sup.* p. 668. *D. Roxburgh* v. *E. Home*, M. 14272, 2 Paton, Ap. 358.

[2] *Murray* v. *Mag. of Kircudbright*, 2 Sh. Ap. C. 299.

[3] Stat. 1698. *L. Erskine* v. *Mag. of Stirling*, M. 14268; 6 Paton, Ap. 774.

[4] 22 & 23 Vict. c. 70, § 2.

[5] 26 & 27 Vict. c. 50, § 4.

of a mile in length where such fishings comprehend both sides of the river, and several others, are constituted Commissioners for the execution of the Act.[1] They hold a general meeting once a year, on the first Monday of September, at a place to be appointed at the previous annual meeting.[2] Special meetings may also be held at other times on a requisition signed by three Commissioners.[3] Various details are given as to the appointment of officers and the keeping of accounts. The Commissioners have power to rate the owners of Salmon Fisheries in the river for expenses.[4]

Water Bailiffs. — The Commissioners may appoint water bailiffs for the protection of the fisheries and detection of offenders, and the bailiffs are not to act without previously taking an oath.[5] The water bailiffs have the powers of constables as regards all matters connected in the Act, in the same manner as if offences against the Act were breaches of the peace, and for the purpose of preventing offences, or of detecting and apprehending offenders, to enter upon any grounds adjoining the river, and at all times with their boats or otherwise to enter upon any fishery on the river for the purpose of preventing or detecting unlawful fishings or obstructions in the river, and to moor, anchor, or otherwise fix their boats at such places as they shall find convenient, provided that by such mooring, anchoring, or fixing their boats they do not obstruct or impede any legal mode of fishing.[6] It shall be lawful

[1] 20 & 21 Vict. c. 148, § 10.
[2] Ibid. § 17. [3] Ibid. § 18. [4] Ibid. § 79, 80, 81.
[5] Ibid. § 36. [6] Ibid. § 37.

for every superintendent or water bailiff, or other person whatsoever, without any warrant or authority other than this Act, *brevi manu*, to seize and detain any person who shall be found committing any offence against the provisions of this Act, and to convey such offender, or cause him to be conveyed by any constable or other peace officer, in case the offence is committed in England, before any Justice having jurisdiction in the place where the offence is committed, or where the offender resides or is found, who shall forthwith proceed against such offender according to law, and according to the provisions in this Act contained; and in case the offence is committed in Scotland such offender shall be conveyed, by any person apprehending him, before the Sheriff or some Justice having jurisdiction in the place where the offence is committed, or where the offender resides or is found, and such Sheriff or Justice shall forthwith examine, and thereupon discharge or commit such offender until caution, *de judicio sisti*, be found as the case may require.[1] Every person who shall resist or make forcible opposition to or assault any high or petty constable, peace officer, sheriff officer, superintendent, or water bailiff, or any other person employed in the execution of this Act shall for every such offence be liable to a penalty not exceeding 5*l*.[2]

Justices, &c. Interested.—All Sheriffs, Justices of the Peace, and other Magistrates may act though interested, if not directly interested.

The Annual Close Time.—The annual close time ex-

[1] 20 & 21 Vict. c. 148, § 38. [2] Ibid. § 39.

tends from the 14th September to 15th February following exclusive, except as to rod and line with the artificial fly, and as to rod and line it extends between 30th November and 1st February following exclusive. But the Commissioners may during the close time permit fish to be taken with the owner's consent for artificial propagation.[1] Therefore, an angler can only use the artificial fly between 14th September and 30th November, and between 1st February and 15th February.

Weekly Close Time.—The weekly close time extends from 6 P.M. on Saturday and 6 A.M. on Monday morning, except as regards stake-nets and bag-nets, and rod and line. And as to stake and bag-nets these must not be used between the low water next in point of time before 6 P.M. on Saturday and the low water next in point of time before 6 A.M. on Monday.[2] There being no other enactment as to weekly close time, it follows that a person, if otherwise entitled, may angle on the Sunday (except during the annual close time above-mentioned) in the Tweed and its tributaries without committing any penal office; whereas he would commit such office if he angled on the other salmon rivers of Scotland.[3]

The penalty for unlawfully fishing during close time, annual or weekly, is 10*l.* and 10*s.* per salmon caught, besides forfeiture of the boat, net, tackle, or engine used.[4]

Having or Selling Fish in Close Time.—The penalty for having or selling, during annual close time, fish known to have been illegally caught in close time is

[1] 22 & 23 Vict. c. 70, § 6.
[2] Ibid. § 7.
[3] See *ante*, p. .
[4] Ibid.

10*s.* and 2*l.* for each fish. But it is no offence to have or sell fish taken with rod and line beween 15th September and 30th November, and between 1st and 14th February inclusive.[1] It may be observed that it is no offence to buy fish so illegally caught, provided the party has them not in his possession. It also appears that while on the Tweed an angler can sell his fish during close time, he cannot do so in the other rivers of Scotland.[2]

Removal of Boats and Nets in Close Time.—On or before 17th September occupiers of fisheries must remove their boats, nets, &c. except those used for angling, which may remain till 3d December.[3] The penalty is 20*l.* and forfeiture of the boats, &c. If the boats, nets, &c. are not duly removed, a superintendent or water bailiff may seize and convey them away, and he may also at any time during annual close time enter on the fishery or fishing grounds, and without warrant search for boats, tackle, &c. concealed there, and if necessary break open doors to do so.[4] So if nets, engines, or tackle are left in the river during annual or weekly close time the water bailiffs may carry them away, and the Commissioners may destroy them or return them to the owner.[5] It shall not be lawful for any person other than an owner or occupier of a fishery in the river or otherwise entitled to fish for salmon therein, or having an exclusive right of fishing for salmon in any fishery beyond the river, or having a licence under the hand of

[1] 22 & 23 Vict. c. 70, § 10.
[2] See *ante*, p. .
[3] 22 & 23 Vict. c. lxx. § 11.
[4] 20 & 21 Vict. c. 148, § 48.
[5] Ibid. § 49.

the clerk, to have in his possession, within five miles from the river, any net or engine of the description of those used for taking or killing salmon, &c. under a penalty of 20*l.* and forfeiture.[1]

A search warrant may be obtained on information or oath before a Justice or a Sheriff, and the water bailiff or constable may carry off all illegal implements so found.[2]

Ferry-boats are not to be used for fishing, under a penalty of 10*l.* and are to have the owner's name painted, under a penalty of 5*l.*[3] So private boats must have the owner's name painted thereon and numbered, and no boat which in the fishing season is generally and ordinarily used for fishing with nets shall be used for angling or rod-fishing; offences against this section are punishable by a penalty of 5*l.* and seizure of the boat.[4] All boats used for fishing with nets are to be marked, so as to distinguish them from angling-boats and ferry-boats, under a penalty of 5*l.* and seizure of the boat.[5]

Fixed Nets, Dams, &c.—Fixed nets and fixed engines are not to be allowed under a penalty of 20*l.*, and 10*l.* per day, and 10*s.* per salmon so caught, and any two Commissioners may remove and take away such net or engine.[6] But water-wheels and machinery for manufacturing purposes are not to be affected by this Act.[7]

Mill-dams, dykes, wears, caulds, and other permanent obstructions shall be so constructed as to permit the

[1] 20 & 21 Vict. c. 148, § 50.
[2] Ibid. § 51.
[3] Ibid. § 52.
[4] Ibid. § 53.
[5] Ibid. § 54.
[6] Ibid. § 55.
[7] Ibid. § 61.

free run of salmon in the ordinary state of the river. The Commissioners may cause the alterations to be made, and the expense thereof to be chargeable to the Commissioners if the dams, &c. existed before the Act, and to the owners if made after the Act.[1] So rocks, stones, mud, and other obstructions in the river are to be removed by the owners of the soil or fishery.[2] All cairns used for fishing with nets are to be removed.[3] Hecks are to be placed in mill-leads with vertical bars three and a quarter inches wide, under a penalty of 5*l.*[4]

Beating the Water.—Every person who beats the water or places, uses, or sets any white object or any net or other thing whatsoever, in, over, or across the river so as to prevent, or for the purpose of preventing, salmon from entering or from going up or down the river or any part thereof, or who in any other way or manner prevents or obstructs salmon from entering or going up and down the river shall, for the first offence, be liable to a penalty not exceeding 20*l.*, and the net or object or thing so placed, used, or set may be seized and forfeited.[5]

Stake and Bag-nets.—Stake-nets and bag-nets placed beyond the mouth of the river must be constructed and placed in conformity with the details given in the statute.[6]

Size of Meshes of Nets.—No net is to be used in fishing the river of which the meshes shall be less than one and three-quarter inches from knot to knot (except

[1] 20 & 21 Vict. c. 148, § 56.
[2] Ibid. § 57.
[3] Ibid. § 58.
[4] Ibid. § 59.
[5] Ibid. § 60.
[6] 22 & 23 Vict. c. 70, § 12.

herring and shrimp-nets), under a penalty of 10*l.*, and 10*s.* per salmon, and forfeiture of net and salmon.[1]

Pout-nets or Rake-hooks.—Any person using a pout-net, rake-hook, or similar instrument to kill or take salmon, or has such in his possession within five miles of the river, incurs a penalty of 2*l.*, and 10*s.* per salmon, besides forfeiture; but scoop-nets used to take the fish out of stake or bag-nets are excepted.[2]

Wear Shot-net.—Every person who shall shoot or work any wear shot-net in the river within the distance of thirty yards of any other wear shot-net already shot or being worked in the river before such last-mentioned net is fully drawn and landed, shall for every such offence be liable to a penalty not exceeding 5*l.*[3]

Leisters and Spears.—Every person who takes or kills salmon in the river by means of any leister or spear, or any such engine, shall for every such offence incur a penalty of 10*l.*, and 10*s.* per fish, besides forfeiture.[4] So every person who has in his possession, within five miles from the river, any leister, spear, or similar engine of the description, &c. incurs a penalty of 2*l.* and forfeiture.

Poisoning River.—Every person who at any time lays or places in the river, or allows to fall or run or flow into the river any hot lime or refuse of gasworks or products thereof, or prussiate of potash, or any water in which green flax has been steeped, or any matter or thing which shall poison or kill any salmon or smolt

[1] 22 & 23 Vict. c. 70, § 13.
[2] Ibid. § 14.
[3] 20 & 21 Vict. c. 148, § 62.
[4] Ibid. § 63.
[5] Ibid. § 64.

shall for every such first offence be liable to a penalty not exceeding 5*l.*, and for every subsequent 10*l.*, and 2*l.* per day while the offence is continued.[1] So laying or placing cinders and rubbish subjects the party offending to a penalty of 40*s*.[2]

Penalty on Fishers when not Entitled.—Any person illegally fishing in the river for salmon during the fishing season incurs a penalty of 10*l.*, and 10*s.* for each fish, besides forfeiture of boat, net, tackle, &c.[3] Every person who enters, or is found upon any ground adjacent or near to the river, or in or upon the river, with intent illegally to take or kill salmon, shall for every such offence be liable to a penalty not exceeding 5*l.*[4] This intent may be inferred by the Sheriff or Justice from the party having in his or any companion's possession nets or implements, and other circumstances.[5]

Foul or Unseasonable Fish.—Whoever during the fishing season knowingly takes or kills unclean or unseasonable salmon incurs a penalty of 5*l.* and forfeiture.[6] Foul and unseasonable fish when taken must be immediately put back into the river with as little injury as possible.[7] But this last enactment does not apply to sea-trout, bull-trout, or whitling taken by means of the rod and line.[8]

Cleeks.—Every person who shall between 15th September and 1st May following, in fishing with a rod and line, use any cleek or instrument for landing fish

[1] 20 & 21 Vict. c. 148, § 65. [2] Ibid. § 66.
[3] 22 & 23 Vict. c. 70, § 15. [4] 20 & 21 Vict. c. 148, § 68.
[5] Ibid. § 69. [6] Ibid. § 70. [7] Ibid. § 72.
[8] 22 & 23 Vict. c. lxx. § 17.

other than a landing net shall be liable to a penalty not exceeding 5*l.*[1]

Trout Fishers catching Salmon.—If any person while in the act of fishing for river or fresh-water trout during the period when salmon may be lawfully taken and killed, takes any salmon in or from the river, he shall forthwith deliver up such salmon to the owner or occupier of the fishery where the same was taken, and every person who fails or refuses to deliver up any salmon so taken shall be liable to a penalty not exceeding 2*l.* for every such salmon.[2]

Destroying Spawn.—Every person taking or destroying smolt, fry, or young brood or spawn of salmon, except by rod and line, or disturbs spawning beds, incurs a penalty of 10*l.*, besides 2*s.* per fish, and forfeiture of fish and tackle.[3] Whoever wilfully kills smolt, fry, or young brood of salmon by the rod and line between 1st April and 1st June each year, or has such in his possession, incurs a like penalty.[4]

The Trout-fishing Act, 8 & 9 Vict. c. 26, applies to the whole of the river Tweed,[5] though the Act is now mainly repealed by the Act 23 & 24 Vict. c. 45.[6]

Salmon Roe.—The provision in the Scotch Salmon Fisheries Act prohibiting the use of salmon-roe in fishing applies to the Tweed.[7]

Three or more Poaching by Night.—The provision

[1] 22 & 23 Vict. c. lxx. § 16.
[2] 20 & 21 Vict. c. 148, § 73.
[3] Ibid. § 74. [4] Ibid. § 75. [5] Ibid. 76.
[6] *Ante*, p. .
[7] 25 & 26 Vict. c. 97, §§ 12, 34.

in the Scotch Salmon Fisheries Act as to three or more poaching salmon by night extends to the Tweed.[1]

Procedure.—The superintendent of water bailiffs may prosecute for offences and penalties.[2] Penalties may be summarily recovered before the Sheriff or a Justice or Justices having jurisdiction in the place where the offence is committed, or where the offender resides or is found.[3]

The Solway.—The Solway is still governed by the statute 44 Geo. III. c. 45. After 1st January, 1865, the provisions in the English Salmon Fisheries Act, 24 & 25 Vict. c. 109, as to fixed engines shall apply to the Solway and to its tributary rivers; though the

[1] 25 & 26 Vict. c. 97, §§ 27, 34.

[2] 22 & 23 Vict. c. 70, § 18.

[3] 20 & 21 Vict. c. 148, § 82. The penalties may be levied by poinding, or distress and sale, § 83. The offender may be kept in safe custody until return made to the warrant of poinding or distress and sale, unless security be given; and if there is no sufficient distress, then he may be committed to prison for two months for a first offence, three months for a second offence, and four months for a third offence, § 84. The distress is to be made by sale of the goods and chattels of the offender, § 85. Offenders may be committed to prison without poinding or sale, 22 & 23 Vict. c. lxx. § 20. Every such penalty, when recovered, shall be paid to the Commissioners, or to their clerk or treasurer, or other person authorized to receive the same, to be applied for the same purposes as the rates, 20 & 21 Vict. c. 148, § 87. The complaint respecting such offence must be made within six months after the commission of the offence, § 88. Forfeited articles seized by the water bailiff or constable, may be destroyed or sold, by order of the Justice or Sheriff, § 92. The prosecutor is not bound to negative, by evidence, any licence or consent, but it lies on the defendant to prove the same affirmatively, § 95. There is an appeal to the next Circuit Court of Justiciary against any adjudication or conviction in Scotland, § 96; and in England the appeal is to the Quarter Sessions, §§ 97, 98.

offences shall be prosecuted under the Scotch Salmon Fishery Acts.[1]

[1] 25 & 26 Vict. c. 97, § 33; 26 & 27 Vict. c. 50, § 3.

[2] The words "or any other fish whatever," following the words "salmon-grilse, sea-trout, salmon-trout, or whiting, otherwise herling," in the Solway Fishery Act, 44 Geo. III. c. 45, § 9, include ordinary trout, *Henderson* v. *Johnstone*, 11 Dec. 1862, 35 Sc. Jur. 76.

So any person may prosecute under the Act. If the Procurator Fiscal prosecutes, and the complaint is dismissed, he may be liable to pay expenses, *Walker* v. *Jones*, 35 Sc. Jur. 51.

The Court of Justiciary, on appeal against a conviction, may review the case on the merits, *Bennet* v. *Jones*, 35 Sc. Jur. 1.

IRELAND.

IRELAND.

IRISH FISHERIES GENERALLY — COMMON LAW AS TO FISHERIES — FISHERY COMMISSIONERS — FISHERY DISTRICTS — SPECIAL COMMISSIONERS — BYE-LAWS — MEANING OF TERMS — FUNDS OF DISTRICT BOARD — SEA-FISHERIES — HERRING — OYSTERS — CLOSE SEASON FOR OYSTERS — LICENCE DUTY ON ENGINES — LICENCES, HOW OBTAINED — ANNUAL RULE ON FISHERIES — NATURAL OBSTRUCTIONS IN RIVERS — FISHING WEARS — FIXED NETS — RIGHT TO STAKE AND FIXED NETS BAG-NETS — BOXES, CRIBS, ETC. — FREE GAPS — OTTERS, SPEARS, ETC. — CROSS LINES — TAKING FISH IN MILL-DAMS, ETC. — FISHING BY NIGHT — NETS AT MILL-DAMS, MOUTHS OF RIVERS, ETC. — MESHES OF NETS — SPAWN OF SALMON, TROUT, AND EELS — UNCLEAN FISH — POISONING RIVERS — ANNUAL CLOSE TIME FOR SALMON, TROUT, EELS, AND ANGLING — REMOVAL OF NETS, AND FISHING DURING ANNUAL CLOSE TIME — WEEKLY CLOSE TIME — ILLEGAL FISHING IN CLOSE TIME — POACHING IN PRIVATE FISHERIES — ENTERING LANDS TO FISH — OBSTRUCTING PERSONS FISHING — OFFENDERS BOUND TO TELL THEIR NAMES — OFFENDERS USING VIOLENCE — WATER-BAILIFFS' PROCEDURE.

Irish Fisheries Generally. — The Irish fisheries were regulated by many ancient statutes from the time of Edward IV. to George IV., which applied in some cases also to British fisheries; but these were all repealed, so far as relates to Ireland, by the General Act, 5 & 6 Vict. c. 106, which consolidated and amended the law. Subsequent statutes have passed, which modify that statute, viz. 7 & 8 Vict. c. 108, 8 & 9 Vict. c. 108, 9 & 10 Vict.

c. 114, 11 & 12 Vict. c. 92, 13 & 14 Vict. c. 88, and finally the Salmon Irish Fisheries Act, 26 & 27 Vict. c. 114. These statutes deal with fisheries in the sea, as well as in rivers. The enactments are very voluminous and confused, being piled upon each other without method. Nevertheless, they are all to be read together as one Act. An attempt is here made to arrange the subject-matter, and give all the leading enactments now in existence which have not been repealed. It may be observed that the Larceny Act, 24 & 25 Vict. c. 96, which governs the law of poaching in England, extends to Ireland, and, of course, repeals those sections of the Irish Acts which dealt with that branch of the subject.

Common Law as to Fisheries.—The common law as the right of fishing in the sea, and navigable rivers and waters in Ireland, is entirely the same as that of England, and need not be here repeated. The law is the same as to the legality of wears at common law; and, indeed, several of the cases already referred to in illustration of the law of England as to wears are Irish cases. It is only so far as the modern statutes governing the Irish fisheries vary that law that it differs from the law of England, which has now a modern statute of its own which does not extend to Ireland. It will, therefore, be borne in mind, in what follows, that the common law of Ireland is the same as that of England, and still remains so, except where the following enactments qualify that law.

Fishery Commissioners.—The statute 5 & 6 Vict. c. 106, which repealed all the previous Acts, constituted the Commissioners of Public Works in Ireland, for the

time being, commissioners for the execution of that Act.[1] They were empowered to appoint inspectors of fisheries, at salaries. The Commissioners of her Majesty's Treasury were empowered by 8 & 9 Vict. c. 108, to appoint and pay by salary one person to be a Commissioner of Fisheries to be associated with the Commissioners of Public Works.[2] By the 11 & 12 Vict. c. 92, the two existing inspectors of Irish fisheries were made inspecting commissioners, to act along with the Commisioners of Public Works in the execution of the Fishery Acts; and in future the appointment of the inspecting commissioners was vested in the Commissioners of her Majesty's Treasury. That Act also empowered the Commissioners to divide Ireland into fishery districts. The recent Irish Salmon Fisheries Act, 26 & 27 Vict. c. 114, transferred all the powers of the former Irish Fisheries Commissioners to the Special Fishery Commissioners provided under that Act.

Fishery Districts.—By the Act 11 & 12 Vict. c. 92, the Commissioners were authorised to divide Ireland and the coasts and islands into fishery districts, and to subdivide each district into two or more electoral divisions, and that conservators, who must reside or possess real property in the division, should be returned for each division.[3] The conservators act gratuitously, and are to hold meetings, appoint clerks, inspectors, and water bailiffs.[4] The owners of several fisheries of the

[1] § 2. [2] § 1.
[3] 13 & 14 Vict. c. 88, § 5; 26 & 27 Vict. c. 114, § 29.
[4] 13 & 14 Vict. c. 88, §§ 5, 11.

value of 100*l.* and upwards are *ex officio* conservators. The Commissioners may alter the districts from time to time, giving due notice thereof.[2] All productive fisheries (whether several or not) are rated to the poor, and also pay licence duty.[3] The party may appeal from the decision of the board of conservators to the assistant-barrister for the district, or to the judges of the assize.[4] The election of conservators is to be triennial.[5] Persons who have paid licence duties within any electoral district shall be entitled to vote for conservators either in person or by proxy, according to value, viz. for duty under 2*l.* one vote; between 2*l.* and 5*l.* two votes; between 5*l.* and 10*l.* three votes; above 10*l.* four votes.

Magistrates paying licence duty, and being owners of land abutting on rivers or lakes in any district, may act and vote as *ex officio* conservators.[6] Three conservators are a quorum at a district meeting; matters are determined by the majority of persons assembled; the chairman, besides his original vote, to have a casting vote.[7] The constabulary have the powers of water bailiffs in enforcing the Fishery Acts as to close time, and destruction of spawn or unseasonable fish, &c.[8]

[1] 11 & 12 Vict. c. 92, § 6.

[2] 13 & 14 Vict. c. 88, § 6. "The fishery districts formed are twenty-one, viz. Dublin, Wexford, Waterford, Lismore, Cork, Skibbereen, Bantry, Kenmare, Killarney, Limerick, Galway, Ballynakill, Bangor, Ballina, Sligo, Ballyshannon, Letterkenny, Londonderry, Coleraine, Ballycastle, Drogheda."—*Report of Irish Fishery Commissioners for* 1862.

[3] 13 & 14 Vict. c. 88, § 7; 11 & 12 Vict. c. 92, § 23.

[4] 13 & 14 Vict. c. 88, § 9.

[5] Ibid. § 13.

[6] 26 & 27 Vict. c. 114, § 27.

[7] 11 & 12 Vict. c. 92, § 17.

[8] 7 & 8 Vict. c. 108, § 2.

Special Fishery Commissioners.—The statute 26 & 27 Vict. c. 114, gives power to her Majesty to appoint three Commissioners, to be styled Special Commissioners for Irish Fisheries, who are to have a seal.[1] They are disqualified from sitting in Parliament.[2] Their powers are to continue for two years only.[3] They are paid by salaries.[4] Any one of them may do ordinary acts; but at least two must concur in ordering the removal of an illegal net or wear, though all must hear the cases as to these.[5] They may compel the attendance of witnesses, and examine on oath.[6] Witnesses are punishable for perjury.[7] Proceedings are not to abate by the death or discharge of a Commissioner.[8] On the determination of their office their powers and duties are to devolve on two permanent inspectors of fisheries, to be appointed by the Lord Lieutenant.[9]

All the powers of the former, or Fishery Commissioners, are transferred to these Special Fishery Commissioners, except as to the white sea-fish and oysters.[10] They have power also to define the mouths of estuaries and rivers.[11]

Though the Special Fishery Commissioners are not subject to be ordered or controuled by courts of law and equity in the ordinary way,[12] yet, where any person feels aggrieved with any of their decisions, he may appeal to the Court of Queen's Bench in Ireland within seven days after the decision, in a manner similar to appeals from Justices at petty sessions.[13]

[1] 7 & 8 Vict. c. 109, §§ 32, 33. [2] § 34. [3] § 37.
[4] § 36. [5] § 35. [6] § 38. [7] § 39. [8] § 40.
[9] § 42. [10] § 15. [11] § 17. [12] § 40. [13] § 14.

Bye-laws of Commissioners.—In consequence of the exclusive powers given to the Commissioners to alter the close time and other details of the Irish fisheries, it is necessary, in order to ascertain the entire existing law affecting any particular county, to obtain a copy of the most recent bye-laws, which are, or may be, varied from time to time. By the statute a copy of all bye-laws, rules, orders, and regulations made by the Commissioners must be sent to each clerk of the peace, and notice thereof posted up at the usual place for posting notices in the petty session district,[1] and a printed copy for each district may be bought for one shilling.[2]

Meaning of Terms.—In the Irish Fishery Acts the words "estuary" and "bay" include harbours or roadsteads; "rivers" includes tributaries of rivers, and all other streams and watercourses; "vessels" includes ships, boats, cots, cobles, or curraghs; "fish" include oysters and oyster-brood; "salmon" includes grilse, peall, sea-trout, samlets, par, and all other fish of the salmon kind, and the spawn and fry thereof; "trout" includes pollar or fresh-water herring, and all fish of the trout kind, and spawn or fry thereof; "net" includes all descriptions of tackle, trawl, trammel, stake, bag, cogsbill, eel, haul, draft, and seine nets, and all other engines or devices used for like purposes; "fixed net" or "fixed engine" includes wears, stake, bag, stop, and still nets, and all other engines or devices used for like purposes.[3]

Funds of the District Board.—All sums received for

[1] 5 & 6 Vict. c. 106, § 92.
[2] § 93.
[3] 13 & 14 Vict. c. 88, § 1.

licence duties and rates, and from the sale of forfeited engines or nets, or instruments, and from penalties, are paid to the credit of the Fishery Commissioners, and applied in respect of each district; and the treasurer, when one is appointed, keeps and pays the same over to the board of conservators, for the purposes of the district.[1] The treasurer of the district is to keep and pay over the duties and rates to the conservators of the year for which these were payable.[2]

Use of Shore by Herring Fishermen.—There is no close season in the Irish sea fisheries, except as to oysters. At common law there is no right in sea fishermen to make use of the sea-shore, which belongs to individuals.[3] But in Ireland a power has been given by statute in certain cases.[4]

"It shall be lawful for all fishermen and persons employed by them to enter upon all such beaches, strands, and wastes on or adjoining the sea-shore, or any estuary, as may be necessary for the purpose of carrying on any herring or other sea fishing, and also to draw up and spread their nets and land their fish upon any such beach, strand, or waste: provided nevertheless, that they shall not erect any fixtures or fixed nets thereon, save as herein-after provided.

"And it shall be lawful for all watchmen, directors, and guiders of fishermen, and all such fishermen themselves, and such other persons as shall necessarily attend the nets or fishings at the times of fishing for herrings,

[1] 11 & 12 Vict. c. 92, § 27.
[2] 5 & 6 Vict. c. 106, § 3.
13 & 14 Vict. c. 88, § 8.
[3] See *ante*, p.

pilchards, and other sea fish, to enter and go into and upon any lands which do lie or adjoin near unto any fishing place, fit, convenient, and necessary to watch and to draw or carry the fish on shore, and there to watch for the said fish, and to direct and guide the said fishermen which shall be upon the sea and sea-coasts for the taking of the said fish; provided that no person shall be empowered or anthorized by this Act to enter in or upon any enclosed garden, or any tillage land with a growing crop thereon.[1]

"If any person shall resist or forcibly obstruct any fisherman or person employed by him in entering upon and using in the manner and for the purposes aforesaid the said beaches, strands, wastes, and other lands, save gardens and lands with a growing crop as aforesaid, every person so offending shall for every such offence forfeit and pay any sum not exceeding 5*l.*[2]"

Fishing Vessels Registered.—All fishing vessels on the coast of Ireland shall be marked and registered at the coast-guard station or custom-house office adjacent, under a penalty of 10*l.*[3]

Every boat, cot, or curragh, shall have the name of the owner, or of one of the owners, painted on a conspicuous place thereof, under a penalty not exceeding 2*l.*[4]

Sea Nets.—The restrictions on sea nets were contained in the statute 5 & 6 Vict. c. 106.

"And be it enacted, that no net or other engine covered with canvas, hide, or other material, by which unsizeable and young fish may be taken or destroyed,

[1] 5 & 6 Vict. c. 106, § 4.
[2] Ibid. § 5.
[3] Ibid. § 16.
[4] Ibid. § 81.

shall be used on the sea-coast, or within any estuary, except for the purpose of dredging for shell fish, and every person offending by such use of any such net or engine shall forfeit the same, and shall also for every such offence forfeit and pay any sum not exceeding 10*l.*"[1]

And no person shall, at any time between sunrise and sunset, set either in the sea, or within the tideway, in any estuary, any sea-net for catching herrings, or any trammel-net, unless specially authorized by a bye-law of the Commissioners, or leave any drag or other net in the water between sunrise and sunset, except seines or drift-nets for pilchards, or fish other than herring; but all persons may use seine-nets for the catching of herrings, save in such places as may be forbidden by any bye-law of the Commissioners.[2]

"Every person who shall, between sunset and sunrise, have set, either in the sea or within the tideway in any estuary, any such net as is hereby prohibited from being left set or in the water between sunrise and sunset, shall before sunrise haul up and remove such net or nets; and every person offending by not so hauling up and removing such net before sunrise, shall forfeit the net so set or in the water, and shall also forfeit and pay any sum not exceeding 5*l.*, unless it shall be proved to the Justice before whom complaint shall be made against such person, that he was prevented by sudden storm or stress of weather from hauling up and removing such net.[3]

[1] 5 & 6 Vict. c. 106, § 6.
[2] 7 & 8 Vict. c. 108, § 7; 8 & 9 Vict c. 108, § 15.
[3] 5 & 6 Vict. c. 106, § 8.

"Every person who shall use any trawl or trammel-net at any season or any place, either in the sea or within the tideway in any estuary, when or where the use of the same shall have been prohibited by any bye-law to be made as herein-after mentioned, shall forfeit every such net so used, and shall for every such offence also forfeit and pay any sum not exceeding 20*l.*[1]

"And whereas shoals of herrings and other fish are frequently prevented from entering bays and estuaries by persons setting nets at or across the entrance of such bays and estuaries: be it therefore enacted, that if any person shall set any net at or across the entrance of any bay or estuary in any place or at any time which shall be prohibited by any such bye-law, every person so offending shall forfeit and pay for each such offence any sum not exceeding 5*l.*[2]

Sea Fish near Wears.—"Whereas soles, turbot, sprats, hake, and other white sea fish are now caught by means of wears in the tide-ways of certain rivers during the close salmon season, and it is expedient that such fisheries should, under certain restrictions, be permitted: be it enacted, that it shall be lawful for all persons now legally entitled by charter or prescriptive right to the use of such wears to continue to use them for the purpose of catching white fish, notwithstanding its being the close salmon season, provided they obtain the

[1] 5 & 6 Vict. c. 106, § 9. Trawling has been prohibited by bye-law of the Commissioners in several places, as Dublin Bay, East Coast, Dundrum Bay, Belfast Lough, Lough Swilly, Donegal Bay, Galway Bay, Brandon Bay, Bantry Bay, Glamdore Harbour, Waterford Harbour, Wexford Coast. Trawling has been prohibited in Dungarvon Bay and Inver Bay.—*Report of Irish Fishery Commissioners for* 1862.

[2] Ibid, § 10.

licence of the Commissioners appointed under this Act to do so; and it shall be lawful to the said Commissioners to issue their licence accordingly, for such period as they may think proper; provided, however, that all such wears shall be subject in all other respects to the provisions of this Act, and to such bye-laws and regulations as may be made in regard to them by the said Commissioners, pursuant to the powers reserved to them in this Act.[1]

Oysters.—The right to oyster beds in Ireland is the same at common law as in England; they go with the soil, and whoever is the owner of the soil is entitled to keep oysters there.

Stealing Oysters.—The property in oysters and oyster beds is protected by the same statute as in England, viz. the Larceny Act, 24 & 25 Vict. c. 96, § 25.[2] Nothing in the Acts protects oyster beds lying below the level of the lowest spring tides, unless these are held by charter, grant, patent, statute, or prescription.[3]

Power to Make Oyster Beds.—Power was given to owners or occupiers of lands adjoining the sea or any estuary, with the consent of the Fishery Commissioners, to form oyster beds, and appropriate part of the shore for that purpose, but so as not otherwise to abridge the right of the public in other respects. The enactment was as follows:—

"It shall and may be lawful for the owner or occupier of any land bordering on the sea or any estuary, with the permission in writing of the said Commissioners, or

[1] 5 & 6 Vict. c. 106, § 39.
[2] *Ante*, p.
[3] 8 & 9 Vict. c. 108, § 16.

for any person or persons, with the consent of such owner or occupier, and with the permission in writing of the said Commissioners, to form or plant any oyster bed or laying on the shore adjacent to such lands, and either above or below the level of the lowest water marks of spring tides, as the said Commissioners shall think fit; and it shall be lawful for the several persons forming or planting any such oyster bed or laying to hold the same as private property, and to exercise an exclusive control over the same, and such oyster beds shall be entitled to the like protection as by the said recited acts is provided in case of any other oyster beds or layings being the exclusive property of any person: provided always, that the forming and planting of such oyster beds as aforesaid shall not give any exclusive right or title to the occupancy of the said shore, except for the purpose aforesaid, or to the appropriation of any public banks or beds at present resorted to for oysters, but that the rights hereinbefore granted and conferred are to be considered as exclusively applying to places where no such public oyster beds at present exist; saving to the Queen's most excellent Majesty and all the subjects of this realm the free and full exercise and enjoyment of all other rights of fishing or other rights whatsoever in or along the said shore, subject to the provisions herein contained."[1]

Under this power twenty-five licences were granted up to March, 1853, and nine more were under consideration.[2]

[1] 15 & 14 Vict. c. 88, § 41.

[2] See "Report of Irish Fisheries for 1862."

Close Season for Oysters.—The close season for oysters is from 1st May to 1st September exclusive.[1] Power, however, is given to the Commissioners to alter this period on inquiry.[2] The Commissioners may also, on the application of any person interested, in any oyster fishery in a particular locality, call a meeting of those interested in such fishery, and after hearing and receiving evidence, may appoint a period not exceeding the term of three years, within which it shall not be lawful to dredge for, take, catch, or destroy any oysters, or oyster brood in such locality; such decision to be duly published.[3] Power is also reserved to persons to dredge for and take oysters during close season from natural public beds below the level of lowest spring tides, during such part of the close season as the Commissioners may appoint.[4] But persons who take or possess oysters for any other purpose, shall forfeit all the oysters, and incur the same penalty as is incurred for taking them in close season.[5] If any person dredge for, take, catch or destroy, have in his possession, sell, or buy any oysters or oyster brood within the close season, he shall forfeit such oysters, and a sum not exceeding 5*l.* for each offence, provided that nothing shall prevent the proprietor of any oyster bed, or any person deriving under him, from removing or laying down oyster brood during close season.[6] The minimum penalty is 10*s.*[7]

The penalties for stealing oysters are cumulative.[8]

[1] 5 & 6 Vict. c. 106, § 32.
[2] Ibid. § 33.
[3] 7 & 8 Vict. c. 108, §§ 5, 6; 5 & 6 Vict. c. 106, §§ 33, 34.
[4] 8 & 9 Vict. c. 108, § 19.
[5] Ibid. p.
[6] 5 & 6 Vict. c. 106, § 36.
[7] 11 & 12 Vict. c. 92, § 42.
[8] See *ante*, p. 90.

The Commissioners have exercised their powers of making bye-laws as to the oyster fishery on the coasts of Wicklow and Wexford, Cork Harbour, Tralee Bay, Askill Sound, Clew Bay, Blacksod Bay, and Carlingford Lough.[1]

Improvement of Oyster Beds.—The Fishery Commissioners may make bye-laws, rules and regulations to prevent the destruction and removal of small oysters and to regulate the mode of dredging.[2] Owners or tenants of oyster beds may also appoint water bailiffs to watch the oyster beds and enforce the Acts, and such bailiffs shall have the same powers as those appointed by the Commissioners.[3]

Bait Beds.—A similar power is given to owners of land adjoining the sea or estuaries, with the consent of the Commissioners to form bait beds for the purpose of increasing the means of procuring bait for the line fisheries, and these bait beds are protected like oyster beds.[4]

Licence Duty on Engines, &c.—All engines, nets, instruments or devices whatsoever used for the taking of salmon, trout, pollen (*i.e.* freshwater herring, a species of trout as defined by 13 & 14 Vict. c. 88, § 1), or fish of the salmon trout kind, or for the taking of eels, and all fixed salmon, trout, or eel fisheries within any district, or on or off the sea-coast thereof, shall, except as hereinafter provided, before the same be used in the said year or subsequent year, be duly licenced and rated

[1] See the "Report of Irish Fishery Commissioners for 1862," p. 29.
[2] 8 & 9 Vict. c. 108, § 20. [3] Ibid. § 21.
[4] 5 & 6 Vict. c. 106, § 13.

in the manner hereinafter prescribed upon payment of the licence duty or rate hereinafter provided.[1] The Commissioners have no power to exceed the following scale, but may reduce it in certain districts, except those relating to fixed engines.[2]

Scale of Licence Duties for each engine, net, instrument, or devices used in salmon, trout, pollen, or eel fisheries in districts.

	£	s.	d.
1. Single salmon rods	1	0	0
2. Cross lines and rods	2	0	0
3. Snap-nets	1	10	0
4. Draft-nets or seines	3	0	0
5. Drift-nets	3	0	0
6. Trammel-nets, or draft-nets for pollen	1	10	0
7. Pole-nets	2	0	0
8. Other nets, or similar engines not named above	Licence Duties such as shall be fixed by Commissioners or Conservators as provided by the Act 11 & 12 Vict. c. 92.		
9. Bag-nets	10	0	0
10. Fly-nets	30	0	0
11. Stake-nets, or stake-wears (Scotch)	30	0	0
12. Head-wear	6	0	0
13. For every box, crib, cruive, or drum-net in any wear for taking salmon or trout	10	0	0
14. For every gap, eye, or basket in any wear for taking eels	1	0	0

Note.—Fixed fisheries for salmon or eels claimed to be "several fisheries," whether fished by means of fixed wears with boxes, cruives, or rails for stopping the fish, or by means of the fish being stopped by rocks or other natural or artificial obstructions, and taken by means of draft or other nets . . . To be rated at Ten per cent. on Poor Law Valuation, unless such per-centage be reduced by the Commissioners or by the Conservators, as provided by the Act, 11 & 12 Vict. c. 92.

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[1] 11 & 12 Vict. c. 92, § 8.

[2] 11 & 12 Vict. c. 92, §§ 10, 13; 26 & 27 Vict. c. 114, § 26.

Engines Injurious to Fish.—The Commissioners may by their bye-law prohibit the use at any time or season of any engine or device for the capture of fish which upon inquiry they may deem to be injurious to the fisheries.[1]

Licensing Engines not Enumerated in the Statute.—"For any engine, instrument, net, wear, or device whatsoever not enumerated in the above schedule, and which may be proposed to be used for fishing for salmon, trout, pollen or fish of the salmon or trout kind, or for eels, it shall be lawful for the said Commissioners at any time before a board of conservators shall be formed, and after the formation of such board it shall be lawful for such board of conservators for the district, as the case may be, to fix and determine the licence duty on payment of which the same may be used in such district, regard being had, as far as practicable, to the relative capability of capture and productiveness of the same, as compared with those set forth in the said schedule, and the relative proportion of the duties therein set forth; provided always, that the party proposing to use any such engine, instrument, net, wear, or device not enumerated in such

[1] The duties actually charged for engines hitherto were considerably below those fixed by the statute, and vary in different fishing districts, the duty on salmon rods being usually ten shillings. The number of licenses sold, and the duty obtained for engines in 1862, were as follow:—Salmon-rods, 1771, 967*l.*; cross-lines, 256, 320*l.*; snap-nets, 248, 267*l.*; draft-nets, 462, 917*l.*; drift-nets, 36, 72*l.*; trammel-nets, 128, 65*l.*; pole-nets, 34, 48*l.*; bag-nets, 252, 1016*l.*; fly-nets, 17, 59*l.*; stake-nets, 90, 877*l.*; head-wears, 50, 93*l.*; boxes, cribs, &c. 71, 276*l.*; gaps, eyes, &c. 250, 222*l.*; sweepers, 1, 3*l.*; cog-hills, 57, 41*l.*; loop-nets, 1, 1*l.*

[2] 8 & 9 Vict. c. 108, § 14.

schedule, shall previously give notice to some constabulary or coast-guard officer of the district, or to some inspector appointed under this Act, of his intention to use the same, who shall and is hereby required to forward to the said Commissioners, or the said conservators, as the case may be, a description thereof, as to its relative capability of capture as compared with the engines, instruments, nets, wears, or devices set forth in the said schedule, and shall furnish the name by which it shall be designated, upon which the Commissioners or the said conservators, as the case may be, may authorize the use of the same, upon payment of the licence duty which they may fix, and cause the same to be inserted in the schedule of licences for the said district:

"Provided always, that rods used singly for taking trout, perch, pike, or other fish, save and except salmon, shall not be subject to any licence duty under this Act: provided also, that if any person using a rod shall, under pretence or otherwise of fishing for trout, perch, pike, or other fish, take or kill salmon with such rod, such person shall be subject to a penalty of the like amount as the licence duty for the time being payable for a salmon rod, and the same shall be recoverable before a Justice or Justices in like manner as other penalties under the said recited Acts or this Act.

"Provided also, that all cross-lines used with a rod or rods for taking fish of any kind whatsoever shall be subject to the licence duty payable under this Act for the time being upon cross-lines and rods, until the same shall be altered as herein provided.[1]

[1] 11 & 12 Vict. c. 92, § 21.

Licences for Engines, how obtained, &c.—All licences are printed in the form prescribed by the Commissioners, and stamped with the seal of the district board, and are good only for the year in which they are issed.[1] To alter or fraudulently counterfeit the same subjects the party to a penalty of double the amount of duty.[2] Any person using an engine, net, instrument, or device, or having the same erected or in fishing order, or found with the same in his possession in or near any fishing place, or going to, or returning from fishing, shall produce to any of the Commissioners, or any of their officers, or any conservator of the district, or any inspector, water bailiff, or officers or men of the navy, coast-guard, or constabulary, when demanded, the licence for the same; sellers or manufacturers of the nets, &c. being exempted.[3] No party, except those named, are entitled to have the licence produced to them. The licences are sold by licensed stamp distributors, or persons appointed by the board.[4] But if any person shall have paid licence duty for a rod in any district, he requires no licence for a rod in any other district.[5] Licences are to be sold to all persons demanding, without any question or objection.[6]

Fishing without Licence.—Any person using or erecting any engine, net, instrument, or device whatsoever, without being duly licensed under 11 & 12 Vict. c. 92 and 13 & 14 Vic. c. 88, shall be liable to pay such penalty, not less than double, nor more than treble the licence duty which the engine, net, instrument, or device, he

[1] 11 & 12 Vict. c. 92, § 28. [2] Ibid. p.
[3] Ibid. § 29. [4] Ibid. § 30. [5] Ibid. § 30. [6] Ibid. § 31.

shall have been so using or erecting would for the time being be subject to, in addition to the forfeiture of the engine so used.[1]

Fisheries to be Subject to Annual Rate.—All salmon, trout, or eel fisheries rated to the poor, shall, in each year, pay as an annual rate, in two half-yearly galas, on 1st February and 1st July each year, such sum, in addition to the licence duty to be paid for engines, instruments, &c. as shall be equal to the amount of the difference between the sums paid by such respective persons for such licence duties, and the annual sum of ten per cent. upon the poor law valuation of such fishery, subject to alteration by the district board.[2]

Natural Obstructions in Rivers.—If in any river reefs, or ledges of rocks, shoals, or other natural obstructions prevent or impede the free passage and migration of salmon, trout, and other fish, and hinder the approach and access of the same to the upper parts of the said rivers, or any lakes communicating therewith, and depositing their spawn therein, the Commissioners, on the application of a person interested in the fisheries in the river, may alter the bed so as to secure the free passage of salmon, trout, eels, and other fish, compensation being made to persons injured, and provided no injury is done to mills or drainage.[3]

Fishing Wears.—In Ireland, as in England, wears are legal, if their origin can be traced up to the statute of 25 Edw. III.[4] The Special Fishery Commissioners

[1] 13 & 14 Vict. c. 88, § 12.
[2] 11 & 12 Vict. c. 92, § 23; 13 & 14 Vict. c. 88, § 7.
[3] 5 & 6 Vict. c. 106, § 62.
[4] See *ante*, p. 37.

have power given them by the Irish Salmon Fisheries Act, 26 & 27 Vict. c. 114, § 7, to inquire into the legality of all fishing wears, and remove all which were not legal, except that if the illegality consisted in not having a free gap, and the owner undertake to make such gap, the wear shall not be prostrated. If the fishing wear is unlawful, the owner is bound, after a notice, to prostrate the same in thirty days, otherwise he will forfeit 50*l.*, of which half shall go to the informer and half to the district conservators.[1] Before, however, abating a fishing wear as illegal, the Commissioners are to hear interested parties, as in the case of fixed engines.[2]

Where legal fishing wears have been maliciously injured, the person injured may apply, under 6 & 7 Wm. IV. c. 116, to Presentment Sessions for compensation, and the Grand Jury may order compensation to be levied on the county, barony, parish, district, townland or subdenomination thereof, as the Grand Jury shall direct.[3]

Similar powers as to abatement were given by the the statute 13 & 14 Vict. c. 88. Any person who complains of any wear, fixed net, or engine, may make his complaint, in writing, to the Commissioners, with particulars, as required by 9 & 10 Vict. c. 114, and they may summon the parties before them, and after hearing evidence, may make an order or decision, in writing, under their hands and seals, declaring that such wear, fixed net, or engine, or any part thereof, is a nuisance,

[1] 26 & 27 Vict. c. 114, § 8. [2] Ibid. § 13.
[3] 8 & 9 Vict. 108, §§ 7, 8.

and shall be abated and removed; and the Commissioners shall authorize some person to abate and remove the same, at the expense of the party summoned, who erected or used the same.[1] But the party may appeal to the next Judges of Assize, and if the decision is reversed, the expenses are to be reimbursed.[2] No person other than the persons entitled shall place, erect, maintain, or use any wear, fixed net, or other contrivance for placing or erecting nets, or taking of fish on any parts of the coasts of Ireland, or on the bank or shore of any river or estuary wherein the tide ebbs and flows, or in the sea or tideway adjoining such coast, bank, or shore, under a penalty of from 1*l.* to 10*l.*, and 10*s.* for every fish so taken and destroyed, and forfeiture of the wear, &c.[3] To re-erect a wear, &c. after conviction, causes a forfeiture of the materials and of 10*l.*, and of 2*l.* per day.[4]

Fixed Nets.—All new fixed nets, *i.e.* nets not legally existing in 1862, are illegal, and any person may destroy them.[5] The net and fish are forfeited, and a penalty of 5*l.* to 20*l.* per day is incurred.[6] The Special Fishery Commissioners have power to inquire into and remove, if illegal, all nets injurious to navigation.[7]

If a fixed net (other than a bag-net, which is illegal,) had been in use in July, 1863, having been erected under the Act 5 & 6 Vict. c. 106, is not injurious to navigation, not a common nuisance, and not illegal at common law or under any statute, the Commissioners

[1] 13 & 14 Vict. c. 88, § 14.
[2] Ibid. § 15.
[3] Ibid. § 16.
[4] Ibid. § 17.
[5] *Moulton v. Wilby*, 32 L. J. M. C.
[6] 26 & 27 Vict. c. 114, § 4.
[7] Ibid. § 5.

shall give a certificate of the situation of such net, and it will be legal.[1] A fixed net includes a head-wear.[2]

Stake-wears, stake-nets, and other fixed nets in the sea or tidal ways, must have clear openings in the pouches and traps, as provided by the Acts.[3] All who use, though not entitled to use, stake-wears, stake-nets, bag-nets, and other fixed nets in the sea and tideways, forfeit 10*l.* besides the wear, and being liable to be ordered to remove it.[4]

Right to Stake and Fixed Nets.—By the Act of 1842, any person legally possessed of or entitled to any several fishery in or along any estuary or part of the sea-coast in Ireland, might lawfully fix or erect, subject to such regulations as the Commissioners might impose, any stake-wear, stake-net, bag-net, or other fixed net for the taking of salmon, provided that no right to the shore was, except for the purpose of attaching the nets, thereby conferred.[5] So owners in fee and tenants for a term, not less than one hundred years, of lands adjoining the sea-coast, were empowered to erect stake-nets and fixed nets to the shore adjoining the lands, provided no several fishery belonging to another person existed there.[6] No stake-wear, head-wear, stake-net, bag-net, fixed net, or any contrivance for a net, shall be lawful which obstructs the navigation, otherwise the Commissioners, after inquiry, may cause it to be abated.[7]

Bag-Nets.—All bag-nets, after July, 1863, placed in rivers or estuaries, or within three miles from the mouth

[1] 26 & 27 Vict. c. 114, § 6.
[2] Ibid. § 44.
[3] 13 & 14 Vict. c. 88, § 43.
[4] 8 & 9 Vict. c. 108, § 5.
[5] 5 & 6 Vict. c. 106, § 18.
[6] Ibid. § 19.
[7] Ibid. § 21.

of any river, were declared illegal, and the net and fish caught are liable to be forfeited, and the owner fined 5*l.* to 20*l.* per day.[1] But bag-nets legally existing within three miles of the mouth of a river, in the whole of which the owner has the exclusive right of catching salmon, are exempted.

Boxes and Cribs.—In fishing wears and fishing mill-dams, the boxes and cribs used shall be of a certain situation and form prescribed by statute, under certain penalties. Every obstruction to the free passage of fish through each and every cruive, crib, or box, shall be removed within thirty-six hours after close time has commenced, under a penalty of forfeiture and 50*l.* and 5*l.* per day, and a Justice may order the removal and sale.[4]

Free Gaps.—Every fishing wear must have a free gap, or opening, according to the statutory form,[5] and no compensation is to be given for any loss thus caused;[6] and the owner is bound to make and maintain such free gaps, free from anything to scare the fish from entering, under heavy penalties.[7] Where a river is not more than forty feet broad, and a legal fishing wear exists, the Commissioners may, instead of requiring a free gap, order the weekly close time to be extended twenty-four hours.[8]

The waste-sluices, waste-gates, or overfalls of the wears of any mill or factory, deriving their supply from rivers frequented by salmon, shall at all seasons of the

[1] 26 & 27 Vict. c. 114, § 3. [2] Ibid. [3] Ibid, § 10.
[4] 5 & 6 Vict. c. 146, § 37. [5] 26 & 27 Vict. c. 114, § 9.
[6] Ibid. § . [7] Ibid. § 12. [8] Ibid. § 11.

year when such mills or factories shall not be used for milling purposes, be kept open, if no passage for fish be provided; and when such passage for fish shall be provided, the sluices, and waste-sluices, waste-gates, or overfalls shall be kept down or shut, to force through the passage for fish.

Otters, Spears, Gaffs.—In any freshwater river or lake it shall not be lawful, at any season of the year, to use, for the purpose of taking fish, any otter, lyster spear, strokehaul, dree-draw, or gaff, except when a gaff is used as auxiliary to angling, or where it is used by the owner or occupier to remove fish out of a legal wear or box. The penalty is 4*l.* to 10*l.* besides forfeiture of the implement: eel-spears are excepted.[2]

Cross-Lines.—It shall not be lawful for any person (save the proprietor of a several fishery, or any person duly authorized by him, in writing, within the limits thereof,) to take, catch, or fish for any salmon or trout by means of cross-lines in any river, and any person so offending shall forfeit and pay a sum not exceeding 5*l.*[3]

Taking Fish in Mill-Dams, Watercourses, &c.—If any person shall, at any season of the year, in any mill-pool or mill-dam, or in any works appurtenant to any mill or factory, or in any watercourses leading the water to or from such mill or factory, place, lay, set, or draw any net, grate, creel, or other engine, or use any means or device whatsoever (save and except rod and line, used subject to the provisions of this Act,) for the purpose of

[1] 5 & 6 Vict. c. 106; 13 & 14 Vict. c. 85, § 39.
[2] 13 & 14 Vict. c. 88, § 40. [3] 5 & 6 Vict. c. 106, § 70.

taking, destroying, or obstructing any salmon or other fish, or the fry thereof, the person offending shall forfeit 10*l.* and such nets or other engines; and the owner or occupier of the mill or factory will be taken *primâ facie* to have incurred the penalty, unless it appear he was ignorant of the acts done.[1] In watercourses, cuts, channels, or sluices connected with salmon rivers, the occupier of such watercourse, &c. shall put at the point of divergence a grating or lattice, not exceeding two inches in the space; and during the months of March, April, and May, and such other periods of the year as the brood or fry of salmon or trout shall be descending the river, there shall be placed or stretched over the entire surface of such grating a wire lattice or network, of such dimensions as effectually to prevent the admission of the fry, under a penalty of 10*l.*[2]

Nets during Night in Rivers.—No net, except a landing-net, shall be used in freshwater rivers to catch salmon or trout between eight P.M. and six A.M. of following day, except in a several fishery next above the tidal flow.[3]

Fishing by Night—Disturbing Spawning Fish.—If any person shall, between sunset and sunrise, have or use any light or fire of any kind, or any spear, gaff, strokeall, or other such instrument, with intent to take salmon or other fish, in or on the banks of any lake or river, or if any person shall be found at any time chasing, injuring, or disturbing spawning fish, or fish in the spawning beds, or attempting to catch fish in such

[1] 5 & 6 Vict. c. 106 § 75.
[2] Ibid. § 76.
[3] 26 & 27 Vict. c. 114, § 24.

places (except with rod and flies only within the lawful period), or damming, or teeming, or emptying any river or mill-race, for the purpose of taking or destroying any salmon or trout, or the fry thereof; every person so offending shall forfeit all such instruments and a sum of 10*l.*[1]

Nets, &c. near Mill-Dams.—No person, though possessed of a several fishery for twenty years next before 13 & 14 Vict. c. 88, is entitled to use a box, crib, cruive, net, instrument, or device for taking fish (except rods and lines only) within fifty yards of a mill-dam, unless such mill-dam has a regular fish-pass attached.[2]

Nets at Mouths of Rivers.—No person, except the owner of a several fishery, shall shoot, draw, or use any net for taking salmon at the mouth of any river which is less than a quarter of a mile wide, nor within half a mile, seawards or inwards, from such mouth of the river; nor shall any but the owner of a several fishery in the whole of a river and its tributaries shoot, draw, stretch, or use nets at the mouth or other part of a river, if prohibited as being injurious to the free passage of fish by any bye-law.[3]

Nets in Inland Rivers.—In the inland and freshwater portions of rivers and lakes, no person, save the owner of a several fishery within the limits thereof, shall, at any period of the year, lay, draw, make use of or fish with haul, draft, seine, or other net, for the taking of salmon or trout, unless in cases where a general public right of fishing for salmon with such nets, in the

[1] 5 & 6 Vict. c. 106, § 78.
[2] 26 & 27 Vict. c. 114, § 16.
[3] 13 & 14 Vict. c. 88, § 44.

nature of a common of piscary, has been enjoyed for a space of twenty years next before 1842, under a penalty of forfeiting such nets and a sum not exceeding 10*l.*[1]

Meshes of Nets for Salmon and Trout and Freshwater Fish.—No net for the taking of salmon or trout in the sea, estuaries, or tideways, or for the taking of any fish in the inland and freshwater portions of rivers and lakes, shall be used with a mesh of less size than one and three-quarter inches from knot to knot, to be measured along the side of the square, or seven inches, to be measured all round each such mesh, such measurements being taken in the clear when the net is wet; and if any person shall use any net contrary to this provision, such person shall be liable to a penalty not exceeding 10*l.*, besides forfeiting such net.[2] But the Commissioners may alter the size of meshes in certain localities by their bye-laws.[3] The illegal nets may be retained till the hearing, when the Justices will make an order as to their disposal.[4]

Spawn of Salmon, Trout, or Eels.—If any person shall wilfully take, sell, purchase, or have in his possession the spawn, smolts, or fry of salmon, or of trout, or of eels, or in any way or by any device wilfully obstruct the passage of the said smolts or fry, or injure or disturb any such spawn or fry, or any spawning bed, bank, or shallow where the same may be, such person shall forfeit 10*l.* for each offence, and also the nets or

[1] 5 & 6 Vict. c. 106, § 65.
[2] 8 & 9 Vict. c. 108, § 11; 5 & 6 Vict. c. 146, §§ 20, 66.
[3] 8 & 9 Vict. c. 108, § 12.
[4] 5 & 6 Vict. c. 106, § 103.

engines used;[1] but there is no power to seize the spawn.

Unclean Fish.—If any person at any time wilfully take, kill, destroy, expose to sale, or have in his possession, any red, black, foul, unclean, or unseasonable salmon or trout, such person shall forfeit and pay any sum not exceeding 2*l.* for every such fish so taken, &c.; but fish caught accidentally and immediately returned to the water are excepted.[2] There is no power to seize unclean fish.

Poisoning Rivers.—Any person found on the bank of or near any river with any deleterious matter in his possession, under such circumstances as shall satisfy the Court before whom he may be tried, that such person had employed, or was about to employ, such deleterious matter for the capture or destruction of fish, the said Court is hereby empowered to inflict on such person a penalty not less than 5*l.* nor more than 10*l.* for every such offence; and any person found taking fish from any river or lake, where it shall be proved to the satisfaction of any Justice that such fish have been wilfully poisoned, shall be subject to a penalty of not less than 10*s.* nor more than 5*l.*[3] That enactment repeals, so far as is consistent, the following enactment: "No person shall throw, empty, or cause to run or flow into any river or lake, any dye-stuff or other deleterious or poisonous liquid, or shall throw into such river or lake any lime, spurge, or other deleterious or poisonous matter, or shall steep in such river or lake any flax or hemp, under a penalty of 10*l.* for every such offence.[4]

[1] 5 & 6 Vict. c. 106, § 73.
[2] Ibid. § 74.
[3] 13 & 14 Vict. c. 88, § 36.
[4] 5 & 6 Vict. c. 106, § 80.

Annual Close Time for Salmon—Freshwater.—As regards rivers or lakes above the tideway, or portions thereof where the tide ebbs and flows (except in the counties afternamed), the close season for salmon commences on 15th September.[1] As the close time must at least extend to 168 days, it follows that the last day of the close season is 1st March, inclusive, or in leap years 29th February.

In Tidal Waters.—As regards sea-coast, estuaries, and tideways, the close season for salmon commences on 1st September,[2] and counting 168 days, the last day is the 15th February following.

The Commissioners have no power to reduce the entire period of 168 days, though they may alter the time of commencing and ending the close season in other respects. By 5 & 6 Vict. c. 106, § 35, the close season cannot be altered by the Commissioners till three years elapse from the last change.[3]

Close Season for Salmon in Certain Excepted Counties.—In any of the following counties, or on the coast

[1] 9 & 10 Vict. c. 114, § 1. [2] Ibid. § .

[3] *Varying Close Time in Fishery Districts.*—In the "Report of the Irish Fishery Commissioners for 1862," a table is given, showing the times now fixed in the different districts for the commencement and close of the fishing season for salmon and trout. As regards trout, those periods will remain in full force till altered. But as regards salmon, inasmuch as 168 days must now be allowed in all cases for the close season, it is only the commencement of the close season for salmon there specified that is in force; and if the number of close days does not amount to 168, then there must be added such a number to the end of the existing close season as will make up the number of 168. The latest changes made by the Commissioners in each district can only be ascertained with certainty by application to the Clerk of the Peace, or to the place in each petty sessions' district for posting up notices.

thereof, viz. the counties of Antrim, Tyrone, Donegal Londonderry, Mayo, Fermanagh, Leitrim, and Sligo, no salmon shall be killed, destroyed, or taken by any person from any river, lake, or estuary, or on the sea-coast, on or after 20th August.[1] And counting the 168 days prescribed as the minimum by 26 & 27 Vict. c. 114, § 21, the last day of the close season in those counties is February 3d.

Fishing Wears in Close Time.—An exception is made from the penalties of fishing in close time in favour of certain wears in February. The owners or tenants of ancient wears constructed in freshwater rivers above the ebb and flow of the tide, may use such wears during the month of February, and take salmon from the boxes, cribs, or cruives, or by drawing nets near such wears.[2] There is nothing in subsequent Acts which seems to repeal or to be inconsistent with this enactment.

Annual Close Time—Trout Fishing.—The close season for trout fishing extends from 29th September to February 28th or 29th (*i.e.* the last day) following exclusive.[3] And no fixed crib, cruive, box, or other device, nor any haul, draw, or other net of any description, shall be used for catching trout in any salmon lake or river between 1st and 29th September, exclusive, or at such periods as may be fixed by the commissioners for certain lakes or rivers.[4]

The Commissioners have power to change the close season.[5]

[1] 9 & 10 Vict, c. 114, § 3.
[2] Ibid. § 2.
[3] 13 & 14 Vict. c. 88, § 45.
[4] Ibid. § 45.
[5] 5 & 6 Vict. c. 106, § 33–35. See note, *ante*, p. . In Lough Neagh, pollen or fresh water herring may be caught by trammel or set nets of thread and yarn between 1st March and 29th September.

Close Season for Angling.—The close season for angling with single rod and line extends from 1st November to 1st February following, exclusive.[1] The penalty for angling in close season is a sum not exceeding 5*l.*[2] The close season for angling extends only to salmon and trout; for as to other freshwater fish, there is no close season whatever, and therefore those entitled to fish generally may fish any other kind of fish all the year round. Eels are protected only against being caught by nets, baskets, &c.

Angling is subject to the same restrictions as other modes of fishing, if not specially excepted, as it is sometimes in the several enactments of the Irish Fisheries Acts.

Close Time for Eels.—It shall not be lawful for any person whatever, between 10th January and 1st July, exclusive, to hang or fix any coghill, eel, or other net, or basket, or basket-work, in the eye, gap, or sluice of any eel, or other wear, in any river, or to make use of any other fixed engine for taking eels, or between 1st July and 10th January following, to keep or leave such net, basket, or other engine set, or in the water, in the eye, gap, or sluices of such eel or other wears, between sunrise and sunset.[3]

Eel Fishery.—The fishing of eels is prohibited merely when pursued by the means and at the times above stated; but as regards other means of catching them, such means may be used at any time of the year, the rule being that eel fishing is open all the year round,

[1] 26 & 27 Vict. c. 114, § 23. [2] 5 & 6 Vict. c. 106, § 69.
[3] Ibid. § 31.

except so far as is restricted by the above enactment. See spawn.

If any person during such close time shall place or hang any coghill, or eel-nets, or baskets, or other fixed modes of catching fish, in the eyes, gaps, or sluices of eel or other wears, he shall forfeit the nets, and 10*l.* for each net; and if any person shall hang such nets between sunrise and sunset during the open season for eel fishing, he shall forfeit the nets and 5*l.* besides for each such net; and proof of the person being occupier of the wear shall be *primâ facie* evidence of the nets, &c. being hung by him.[1]

If the proprietor or tenant of any eel-wear shall take, or suffer to be taken therein any salmon or trout, or salmon or trout fry, or spent salmon, every such proprietor or tenant shall forfeit and pay for each and every such offence a sum not exceeding 10*l.*[2]

Removal of Salmon Nets during Close Time.—Every proprietor, lessee, or other person engaged in fishing for salmon by means of nets, of any kind or description, shall remove and carry away from any strand, or the banks of any river, or from the vicinity thereof, during the yearly close season all such nets, under a penalty of forfeiting such nets, and a sum between 2*l.* and 10*l.*[3]

Fishing, &c. during Annual Close Time.—If any person during the annual close season wilfully take or fish for, or aid or assist in taking or fishing for, any salmon or trout, he shall forfeit the fish, and the net or engine used.[4] And any person who shall buy or sell, or expose

[1] 5 & 6 Vict. c. 106, § 36.
[2] Ibid. § 77.
[3] 13 & 14 Vict. c. 35, § 34.
[4] 5 & 6 Vict. c. 106, § 36.

to sale, or have in his custody or possession, any salmon or trout, or part or portion thereof, caught in the annual close time, shall forfeit such fish, or part of fish, and a sum not exceeding 2*l.* for each such fish or part of fish.[1] And possession of a salmon or trout, or part thereof, during close time, shall be *primâ facie* evidence that the salmon or trout was caught during close time.[2]

Weekly Close Time for Salmon and Trout.—No salmon or trout shall be fished for or taken in any way except by single rod and line between 6 P.M. on Saturday, and 6 A.M. on Monday following.[3] Any net, or other instrument, and any crib, box, or craive used within that time for fishing, shall be forfeited.[4] Salmon or trout caught for artificial propagation are always excepted.[5] No person shall scare or obstruct the free passage of salmon or trout during the weekly close season, under a penalty of 2*l.* to 10*l.* and forfeiture of nets or instruments used; but fishers by rod and line are excepted.[6] And a penalty of 10*l.* to 50*l.* shall be incurred by the person occupying or using such cribs, boxes, &c. during weekly close time.[7]

It follows that no penalty is incurred for fishing with the rod and line on Sunday during the open season.

As regards other fish than salmon or trout, there is no restriction of a weekly close time.

Fishing in Annual or Weekly Close Time.—If a boat, cot, or curragh, found on or near waters frequented by

[1] 5 & 6 Vict. c. 106, § 36; 13 & 14 Vict. c. 88, § 35.
[2] 5 & 6 Vict. c. 106, § 36; 13 & 14 Vict. c. 88, § 36.
[3] 26 & 27 Vict. c. 114, § 20.
[4] Ibid. [5] Ibid, § 22. [6] Ibid, § 25.
[7] 13 & 14 Vict. c. 88, § 46.

salmon or trout has been used during annual or weekly close time for fishing, the person so using shall forfeit 5*l.*; and on a second offence, the boat, cot, or curragh may be seized and forfeited, unless the boat belongs to another person who was not privy to such use.[1] So nets illegally used during close season may be seized and removed by the constabulary or coast guards.[2] But there is no power to seize the fish caught during weekly close time.

Poaching in a Private Fishery.—There were various enactments in the Irish Fishery Acts directed against persons poaching in a several fishery; but the Larceny Act, 24 & 25 Vict. c. 96, §§ 24, 25, 103,[3] apply to Ireland as well as England. There are, however, some enactments still outstanding in Ireland, which go beyond anything which exists in England.

Entering Lands to Fish.—If any person enter upon any lands or premises for the purpose or under the pretence of fishing or angling in any lake, river, stream, pond, or water, without authority in writing from the proprietor or occupier of such lands or premises, such person shall forfeit 2*l.* for every such offence.[4] And any person removing, taking, using, or employing any cott, barge, boat, or vessel, without permission of the owner thereof, shall forfeit a sum of 2*l.*[5]

Obstructing Persons Fishing Legally.—If any person shall resist or obstruct any persons lawfully engaged in fishing, or in proceeding to fish, or in returning from fishing, or shall wilfully and maliciously place any net

[1] 26 & 27 Vict. c. 114, § 18.
[2] 8 & 9 Vict. c. 108, § 10.
[3] *Ante*, pp. 73, 77, 79.
[4] 5 & 6 Vict. c. 106, § 71.
[5] Ibid. § 72.

or other engines with the intent and design to prevent fish from entering the nets of other persons set or placed in a legal manner, every person so offending shall for every such offence forfeit and pay any sum not exceeding 5*l.* and every such net or other engine so placed shall also be forfeited.[1]

Offenders bound to tell their Names.—When any person shall be found, at sea, or on rivers, lakes, or other waters, or on land, offending against any of the provisions of this Act by the use of any illegal net, engine, or device whatsoever for the taking of fish, or by the use of any net, engine, or device prohibited at such time, or in any other manner, it shall be lawful for any officer or person hereinbefore empowered to enforce the provisions of this Act, or for any person interested in the fishery in which such illegal act may be committed, to require the person so found offending forthwith to desist from such offence, and also to tell his christian name, surname, and place of abode; and in case such person shall, after being so required, refuse to tell his real name or place of abode, or shall give such a general description of his place of abode as shall be illusory for the purpose of discovery, or shall wilfully continue such offence, it shall be lawful for the officer or person so requiring as aforesaid, and also for any person acting by his order and in his aid, to apprehend such offender, and to convey him or cause him to be conveyed, as soon as conveniently may be, before a Justice of the Peace, to be dealt with according to law: provided always, that no person so apprehended

[1] 5 & 6 Vict. c. 106, § 28.

shall on any pretence whatsoever be detained for a longer period than twenty-four hours from the time of his apprehension before he shall be brought before some Justice of the Peace; and that if he cannot, on account of the absence or distance of the residence of any such Justice of the Peace, or owing to any other reasonable cause, be brought before a Justice of the Peace within such twelve hours as aforesaid, then the person so apprehended shall be discharged, but may nevertheless be proceeded against for his offence by summons or warrant, according to the provisions hereinafter mentioned, as if no such apprehension had taken place."[1]

This enactment is almost *verbatim* the same as the enactment in the English Game Act, 1 & 2 Wm. IV. c. 32, § 31, and therefore is construed in the same way strictly.[2] The persons named can alone make the demand, and it must be made on the spot. The demand of the name, &c. must be made before an attempt to arrest.[3] The party, when arrested, can be arrested only by the persons described, viz. the water bailiff or officer, or the owner, but he can be detained by those assisting in the arrest while the party arresting goes in search of a Justice within the twelve hours.[4]

Offenders using Violence.—"Where any persons, to the number of three or more together, shall be found by any officer of Her Majesty's navy, or of the coast-guard, or any water bailiff or peace officer, by violence, intimidation, or menace impeding or obstructing, or attempting

[1] 5 & 6 Vict. c. 106, § 87. [2] See Paterson's Game Laws, p. 59.
[3] *R.* v. *Long*, 7 C. and P. 314; *R.* v. *Curran*, 6 C. and P. 397.
[4] *Evans* v. *Macloughlan*, 4 L. T. N. S. 31.

to impede or obstruct, any other person or persons in the lawful prosecution of any fishery, it shall be lawful for such officer of the navy or coast-guard, or water bailiff, or peace officer so requiring, and also for any person acting by his order or in his aid, to apprehend such offenders, and to convey them before a Justice of Peace to be dealt with according to law; and every person so offending by such violence, intimidation, or menace as aforesaid, and every person then and there aiding or abetting such offender, shall, upon being convicted thereof, forfeit and pay for every such offence such penalty, not exceeding twenty pounds, as to the convicting Justice shall seem meet, together with the costs of the conviction, which said penalty shall be in addition to and independent of any other penalty to which any such person may be liable for any other offence against this Act."[1]

This enactment resembles the section in the Night Poaching Act, 9 Geo. IV. c. 69, § 2.[2]

Water Bailiffs.—Any person interested in the preservation of the fish of any river or lake, or any persons who have united themselves into a society for the preservation of the fisheries, or the owner or proprietor of any fishery in any river or lake, or the proprietor of any salmon fishery on the sea coast may appoint, during pleasure, by an instrument in writing of a given form, water bailiffs, whose appointment shall be endorsed by two Justices at petty sessions, and two Justices may also revoke such appointment.[3] A person acting as

[1] 5 & 6 Vict. c. 106, § 88. [2] Paterson's Game Laws, pp. 93, 94.
[3] 5 & 6 Vict. c. 106, § 82.

water bailiff without having his appointment confirmed by Justices forfeits 10*l.*[1] So the board of conservators may appoint water bailiffs who require no approval of Justices, 11 & 12 Vict. c. 92, § 36. The water bailiff has the powers of a constable, and shall be at liberty at all times and seasons, without let or hindrance, to enter into and pass through or along the banks or borders of any lakes or rivers frequented by salmon or trout, or of the tributaries thereof; and, with boats, to enter all such lakes or rivers, and to enter and examine all wears, sluices, mill-dams, mill-races, and water-courses, and all standing, floating, or other nets whatsoever, and to seize all illegal nets, engines, and instruments whatsoever, when used illegally; and the production of his certificate or appointment shall be sufficient warrant for the water bailiff acting; but the bailiff shall have no power to enter a garden enclosed, nor a dwelling-house or its curtilage unless the ordinary road to a wear, dam, or dyke lies through the same, save when authorized by a Justice's warrant.[2] Justices may grant a search warrant on oath to authorize a water bailiff, or other officer appointed by the Commissioners, to enter dwelling-houses or gardens, for the purpose of detecting offences, at such times in the day or night as the warrant shall mention; but the warrant shall not continue in force for more than a week.[3] Officers of Her Majesty's cruisers and men of the coast-guard service may also act as constables, and board vessels to seize illegal nets or engines, &c.[4]

[1] 5 & 6 Vict. c. 106, § 83.
[2] Ibid. § 84.
[3] Ibid. § 85.
[4] Ibid. § 86.

Procedure.—Offences are to be determined by one or more Justices of the place where the offence was committed.[1] Where the offence is committed at sea the Justices of the counties or towns adjoining the coast have jurisdiction.[2] Where the offence is committed in rivers, lakes, or streams forming boundaries between counties or districts, such offence may be prosecuted before any Justices of either district.[3] The penalty may be recovered by distress and sale of the offender's goods, or if no goods, by imprisonment.[4] Where the Commissioners have executed works at the expense of the offender, such expenses may be sued for by civil bill, or by action in any superior court.[5] A form of conviction and dismissal is given.[6] The person aggrieved may appeal to quarter sessions.[7] The Lord Lieutenant may remit the penalty.[8] A report is to be made to the Commissioners of the convictions at each petty sessions.[9]

In case illegal nets and engines are seized, the officer or person so seizing them may retain them in his custody till the sitting of petty sessions, when the Justices will order them to be forfeited, and if illegal in form, to be destroyed or sold.[10]

Witnesses may be committed to the house of correction who refuse, without cause, to give evidence.[11] Informers and owners of fisheries are admissible as witnesses.

[1] 5 & 6 Vict. c. 106, § 94.
[2] Ibid. § 96.
[3] 13 & 14 Vict. c. 88, s 47.
[4] 5 & 5 Vict. c. 106, § 94.
[5] Ibid. § 95.
[6] Ibid. §§ 98, 100.
[7] Ibid. §§ 99, 100, 101.
[8] Ibid. § 102.
[9] Ibid. § 107.
[10] Ibid. § 103.
[11] Ibid. § 105.
[12] Ibid. § 104.

APPENDIX.

APPENDIX.

24 & 25 VICT. C. 109.

AN Act to amend the Laws relating to Fisheries of Salmon in *England*.
[*6th August*, 1861.]

WHEREAS the salmon fisheries of *England* have of late years been greatly injured, and for the purpose of increasing the supply of salmon it is expedient to amend the laws relating to fisheries of salmon in *England*: be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PRELIMINARY.

1. *Short Title.*—This Act may be cited for all purposes as the Salmon Fishery Act, 1861.

2. *Application of Act.*—This Act shall not extend to *Scotland* or *Ireland*, or to the river *Tweed*, as defined by the *Tweed* Fisheries Amendment Act, 1859.

3. *Commencement of Act.*—This Act shall not come into operation until the first day of *October* one thousand eight hundred and sixty-one.

4. *Definition of Terms.*—In this Act, unless there is something inconsistent in the context, the words and expressions hereinafter mentioned shall have respectively the meanings hereby assigned to them; that is to say,

"Person" shall include any body of persons, corporate or unincorporate:

"Salmon" shall include all migratory fish of the genus salmon, whether known by the names hereinafter mentioned, that is to say, salmon, cock or kipper, kelt, laurel, girling, grilse, botcher, blue cock, blue pole, fork tail, mort, peal, herring peal, may peal, pugg peal, harvest cock, sea trout, white trout, sewin, buntling, guiniad, tubs, yellow fin, sprod, herling, whiting, bull trout, whitling, scurf, burn tail, fry, samlet, smoult, smelt, skirling or scarling, parr, spawn, pink, last spring, hepper, last brood, gravelling, shed, scad, blue fin, black tip, fingerling, brandling, brondling, or by any other local name:

"Young of salmon" shall include all young of the salmon species, whether known by the names of fry, samlet, smolt, smelt, skirling or skarling, parr, spawn, pink, last spring, hepper, last brood, gravelling, shed, scad, blue fin, black tip, fingerling, brandling, brondling, or by any other name, local or otherwise:

"Court" shall include two or more magistrates assembled in petty sessions:

"Tidal waters" shall include the sea, and all rivers, creeks, streams, and other waters as far as the tide flows and reflows:

"Inland waters" shall mean all waters that are not tidal waters:

"Dam" shall mean all wears and other fixed obstructions used for the purpose of damming up water:

"Fishing wear" shall mean a dam used for the exclusive purpose of catching or facilitating the catching of fish:

"Fishing mill dam" shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling and other purposes:

"Fixed engine" shall include stake-nets, bag-nets, putts, putchers, and all fixed implements or engines for catching or for facilitating the catching of fish:

"Home Office" shall mean one of Her Majesty's Principal Secretaries of State.

Law of Fishing.

Prohibition of certain Modes of destroying Fish.

5. *Poisoning Rivers.*—Every person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any waters containing salmon, or into any tributaries thereof, any liquid or solid

matter to such an extent as to cause the waters to poison or kill fish, shall incur the following penalties; (that is to say),

(1.) Upon the first conviction a penalty not exceeding five pounds:

(2.) Upon the second conviction a penalty not exceeding ten pounds, and a further penalty not exceeding two pounds for every day during which such offence is continued:

(3.) Upon the third or any subsequent conviction, a penalty not exceeding twenty pounds a day for every day during which such offence is continued, commencing from the date of the third conviction:

but no person shall be subject to the foregoing penalties for any act done in the exercise of any right to which he is by law entitled, if he prove to the satisfaction of the Court before whom he is tried that he has used the best practicable means, within a reasonable cost, to render harmless the liquid or solid matter so permitted to flow or to be put into waters; but nothing herein contained shall prevent any person from acquiring a legal right in cases where he would have acquired it if this Act had not passed, or exempt any person from any punishment to which he would otherwise be subject, or legalize any act or default that would but for this Act be deemed to be a nuisance or otherwise be contrary to law.

6. *Cost of neutralising the Poison.*—Where any proceedings are instituted by any complainant against any person for the recovery of any penalties alleged to have been incurred by him under the last preceding section, if such person, hereinafter referred to as "the defendant," on appearing before the Justices constituting the Court by which he is to be tried in pursuance of this Act, alleges, by way of defence, that he has used the best practicable means, within a reasonable cost, to render such matter harmless, and proves to the satisfaction of the Court that in the event of the complaint being decided against him the expense of permanently preventing the matter complained of would, exclusive of costs, exceed one hundred pounds, and gives security, to be approved by such Court, duly to prosecute his appeal and to abide the event thereof, all proceedings before the Justices shall be stayed, and it shall be lawful for such complainant to bring an action in one of Her Majesty's superior courts of law at *Westminster* against the defendant; and the plaintiff in such action shall deliver to the defendant an issue or issues whereby the question whether he has used the best practicable means, within a reasonable cost, to render such matter harmless may be tried; and the form of such issue or issues, in case of dispute, or in the case of nonappearance of the defendant, shall be settled by the Court in which the action is brought, and such action shall be prosecuted and issue or

issues tried in the same manner and subject to the same incidents in and subject to which actions are prosecuted and issues tried in other cases within the jurisdiction of such Court, or as near thereto as circumstances admit.

7. *Jury to decide as to Remedy.*—The verdict of the jury on such issue shall, unless the Court before which the same is tried orders a new trial, be conclusive as to the questions involved in any subsequent proceedings that may be had for the recovery of any penalties in pursuance of the said section, and any costs that may have been incurred before the Justices by the parties to such action as is mentioned in this section shall be deemed to be costs incurred in such action, and be payable accordingly.

8. *Fishing with Lights, Spears, &c.*—No person shall do the following things or any of them; that is to say,

(1.) Use any light for the purpose of catching salmon:

(2.) Use any spear, gaff, strokeball, snatch, or other like instrument for catching salmon:

(3.) Have in his possession a light or any of the foregoing instruments under such circumstances as to satisfy the Court before whom he is tried that he intended at the time to catch salmon by means thereof:

And any person acting in contravention of this section shall incur a penalty not exceeding five pounds, and shall forfeit any instruments used by him or found in his possession in contravention of this section; but this section shall not apply to any person using a gaff as auxiliary to angling with a rod and line.

9. *Using Roe as a Bait.*—No person shall do the following things or any of them; that is to say,

(1.) Use any fish roe for the purpose of fishing:

(2.) Buy, sell, or expose for sale, or have in his possession, any salmon roe:

And any person acting in contravention of this section shall for each offence incur a penalty not exceeding two pounds, and shall forfeit all salmon roe found in his possession; but this section shall not apply to any person who uses or has in his possession salmon roe for artificial propagation or other scientific purposes, or gives any reason satisfactory to the Court by whom he is tried for having the same in his possession.

10. *Meshes of Nets.*—No person shall take or attempt to take salmon with any net having a mesh of less dimensions than two inches in extension from knot to knot (the measurment to be made on each side of the square), or eight inches measured round each mesh when wet;

and any person acting in contravention of this section shall forfeit all nets and tackle used by him in so doing, and shall for each offence incur a penalty not exceeding five pounds; and the placing two or more nets behind or near to each other in such manner as to practically diminish the mesh of the nets used, or the covering the nets used with canvas, or the using any other artifice so as to evade the provisions of this section with respect to the mesh of nets, shall be deemed to be an act in contravention of this section.

11. *Fixed Engines.*—No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; and any engine placed or used in contravention of this section may be taken possession of or destroyed; and any engine so placed or used, and any salmon taken by such engine, shall be forfeited, and, in addition thereto, the owner of any engine placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty not exceeding ten pounds; and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine, but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage; provided always, that nothing in this section contained shall be deemed to apply to fishing wears or fishing mill dams.

12. *Dams and Wears.*—The following regulations shall be observed with respect to dams:

(1.) No dam except such fishing wears and fishing mill dams as are lawfully in use at the time of the passing of this Act, by virtue of a grant or charter or immemorial usage, shall be used for the purpose of catching or facilitating the catching of salmon:

1. Any person catching or attempting to catch salmon in contravention of this section shall incur a penalty not exceeding five pounds for each offence, and a further penalty not exceeding one pound for each salmon which he catches:
2. All traps, nets, and contrivances used in or in connexion with the dam for the purpose of catching salmon shall be forfeited:
3. All salmon caught in contravention of the above prohibition shall be forfeited:

And no fishing wear, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon unless it have therein such free

gap as is hereinafter mentioned; and no fishing mill dam, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon unless it have attached thereto a fish pass of such form and dimensions as shall be approved of by the Home Office, nor unless such fish pass has constantly running through it such a flow of water as will enable salmon to pass up and down such pass, but so nevertheless that such pass shall not be larger nor deeper than requisite for the above purposes:

(2.) No person shall catch or attempt to catch, except by rod and line, any salmon in the head race or tail race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish-pass of such form and dimensions as may be approved by the Home Office, and such fish pass has constantly running through it such a flow of water as will enable salmon to pass up and down it; and if any person acts in contravention of the foregoing provision,

1. He shall incur a penalty not exceeding two pounds for each offence, and a further penalty not exceeding one pound for every salmon so caught:
2. He shall forfeit all salmon caught in contravention of this section, and all nets or other instruments used or placed for catching the same.

13. *Gratings across Side Streams.*—Where salmon, or the young of salmon are led aside out of a main stream by means of any artificial channel used for the purpose of supplying towns with water, or for supplying any navigable canal, the company or persons having the control over such artificial channel shall, within six months after the commencement of this Act, put up and shall maintain, at their own costs and charges, a grating or gratings across such channel, for the purpose of preventing the descent of the salmon or the young of salmon, and such grating or gratings shall be placed in such form and manner as may be approved by one of the inspectors in this Act mentioned; and any company or persons failing to put a grating or gratings in cases where they are required to do so by this section shall incur a penalty not exceeding five pounds for every day after the expiration of such period of six months during which he fails to comply with the provisions of this section; and any such company or person failing so to maintain the same shall incur a penalty not exceeding one pound for every day during which such failure continues: provided always, that no such grating shall be so placed as to interfere with the passage of boats on any navigable canal.

PROHIBITION OF THE DESTRUCTION OF UNSEASONABLE FISH.

14. *Unclean Fish.*—No person shall do any of the following things; that is to say,

(1.) Wilfully take any unclean or unseasonable salmon;

(2.) Buy, sell, or expose for sale, or have in his possession, any unclean or unseasonable salmon, or any part thereof:

And any person acting in contravention of this section shall incur the following penalties; that is to say,

(1.) He shall forfeit any fish taken, bought, sold, or exposed for sale, or in his possession;

(2.) He shall incur a penalty not exceeding five pounds in respect of each fish taken, sold, or exposed for sale, or in his possession:

But this section shall not apply—

(1.) To any person who takes such fish accidentally, and forthwith returns the same to the water with the least possible injury:

(2.) To any person who takes or is in possession of such fish for artificial propagation or other scientific purposes.

15. *Young Salmon.*—No person shall do the following things or any of them; that is to say,

(1.) Wilfully take or destroy the young of salmon;

(2.) Buy, sell, or expose for sale, or have in his possession, the young of salmon;

(3.) Place any device for the purpose of obstructing the passage of the young of salmon;

(4.) Wilfully injure the young of salmon;

(5.) Wilfully disturb any spawning bed, or any bank or shallow on which the spawn of salmon may be:

And any person acting in contravention of this section shall incur the following penalties; that is to say,

(1.) He shall forfeit all the young of salmon found in his possession;

(2.) He shall forfeit all rods, lines, nets, devices, and instruments used in committing any of the above offences;

(3.) He shall for each offence pay a penalty not exceeding five pounds;

But nothing herein contained shall apply to any person who may have obtained such young of salmon for artificial propagation or other scien-

tific purposes, and nothing herein contained shall prejudice the legal right of any owner to take materials from any stream.

16. *Spawning Salmon.*—If any person wilfully disturbs or attempts to catch salmon when spawning, or when on or near their spawning beds, he shall for each offence incur a penalty not exceeding five pounds; but this section shall not apply to any person who may catch or attempt to catch salmon for the purposes of artificial propagation or other scientific purposes.

Restrictions as to Times of Fishing.

17. *Close Time.*—No person shall fish for, catch, or attempt to catch, or kill salmon between the days hereinafter mentioned (which interval is herein referred to as the close season); that is to say, between the first day of *September* and the first day of *February* following, both inclusive, except only that it shall be lawful to fish with a rod and line between the first day of *September* and the first day of *November* following, both inclusive; and any person acting in contravention of this section shall forfeit any salmon caught by him, and shall in addition thereto incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds in respect of each salmon so caught.

18. *Power of Home Office to vary Close Season.*—The Home Office may, upon the application of the Justices in quarter sessions assembled of any county abutting on water containing salmon, extend or vary the time during which it is prohibited to take salmon in such waters; any such application shall be forwarded to the Home Office by the Chairman of such Justices, but it shall not be entertained by the Home Office until due proof is given that notice of such application has been served on the Clerk of the Peace of every county abutting on such river other than the county from the Justices of which the application proceeds, and that a copy of such notice has been published in every county abutting on such river by advertisement once at least in each of four successive weeks in some local newspaper; the extension of such time as aforesaid by the Home Office shall be made by order under the hand of one of Her Majesty's principal Secretaries of State, and a copy of the *London Gazette* containing such order shall be evidence of the same having been made.

For the purposes of this section any riding or other division of a county having a separate court of quarter sessions shall be deemed a separate county, and any penalties imposed by this Act for the purpose of prohibiting the killing of fish during the close time shall apply to

such extended close time; and the Home Office may from time to time vary the close time so extended.

19. *Selling Fish during Close Time.*—No person shall buy, sell, or expose for sale, or have in his possession for sale, any salmon between the third day of *September* and the second day of *February* following; and any person acting in contravention of this Act shall forfeit any fish so bought, sold, or exposed for sale, or in his possession for sale, and shall incur a penalty not exceeding two pounds for each such fish; but this section shall not apply to any person buying, selling, or exposing for sale, or having in his possession for sale, salmon cured, pickled, or dried, or any fresh salmon caught beyond the limits of this Act, nevertheless the burden of proving any fresh salmon that is sold, or exposed, or in the possession of any person for sale between the said third day of *September* and the said second day of *February* to have been caught beyond the limits of this Act shall lie on the person selling or exposing the same for sale, or having the same in his possession for sale.

20. *Removal of Fixed Engines during Close Time.*—The proprietor or occupier of every fishery for salmon shall, within thirty-six hours after the commencement of the close season, cause to be removed and carried away from the waters within his fishery the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery; and if any proprietor or occupier omits to remove and carry away in manner aforesaid any things hereby required to be removed and carried away he shall incur the following penalties; (that is to say,)

(1.) He shall forfeit all the engines or other things that are not removed and carried away in compliance with this section;

(2.) He shall, for every day during which he suffers such things to remain unremoved beyond the period prescribed by this Act pay a sum not exceeding ten pounds.

21. *Weekly Close Time.*—No person shall fish for, catch, or kill by any means other than a rod and line, any salmon between the hour of twelve of the clock at noon on *Saturday* and the hour of six of the clock on *Monday* morning; and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or movable instrument used by him in taking the same, and in addition thereto shall incur a penalty not exceeding five pounds, and a further penalty not exceeding one pound in respect of each fish so taken between twelve of the clock at noon on *Saturday* and six of the clock on *Monday* morning; but nothing in this section contained shall compel the owner

of any putts or putchers to remove or draw up the same during such time as is mentioned in this section, or subject him to a penalty, so that he lets down a net in such manner or uses such other device as the Home Office approves for the purpose of preventing salmon passing into the putts or putchers during such time as aforesaid.

22. *Cribs or Traps during Weekly Close Time.*—The proprietor or occupier of every fishery shall, between twelve of the clock at noon on *Saturday* and six of the clock on the *Monday* morning following, maintain a clear opening, of not less than four feet in width from the bottom to the top, through all cribs, boxes, or cruives used for taking salmon within his fishery, so that a free space of that width is effectually secured for the passage of fish up and down through each box, crib, or cruive, whether used for the purpose of fishing or not; and shall, for the purpose of maintaining such opening, remove the inscales and rails of all such boxes, cribs, or cruives; and any person acting in contravention of this section shall incur the following penalties:

(1.) He shall for each offence pay a sum not exceeding five pounds, and a further penalty not exceeding one pound for each fish so taken:

(2.) He shall forfeit every fish caught in contravention of this section.

Fish Passes.

23. *Attaching Fish Passes to existing Dams.*—Any proprietor of a fishery with the written consent of the Home Office may attach to every dam existing at the time of the passing of this Act a fish pass, of such form and dimensions as the Home Office may approve, so that no injury be done to the milling power or to the supply of water to or of any navigable river, canal, or other inland navigation by such fish pass; and any person obstructing any person legally authorized in erecting or doing any necessary Act to erect or maintain such fish pass shall incur a penalty not exceeding ten pounds for each act of obstruction; and any person injuring such fish pass shall pay the expense of repairing the injury, such expense to be recovered in a summary manner, and, in addition thereto, if such injury is wilful, shall incur a penalty not exceeding five pounds; and any person doing any act for the purpose of preventing salmon from passing through a fish pass, or taking any salmon in its passage through the same, shall incur a penalty not exceeding five pounds for a first offence, and not exceeding ten pounds for each subsequent offence, and shall forfeit any salmon taken by him in contravention of this section, and any instrument used by him in taking the

same: Provided that if any injury is done to any dam by reason of the affixing of a fish pass in pursuance of this section, any person sustaining any loss thereby may recover compensation for such injury in a summary manner from the person or body of persons by whom such fish pass has been affixed.

24. *Notice to attach Fish Pass.*—The Home Office shall not give their consent to the attachment by a proprietor of a fish pass to any dam, in pursuance of the last preceding section, unless such proprietor proves, to the satisfaction of the Home Office, that he has served notice on the owner of such dam of his intention to apply for such consent, and at the same time has furnished him with plan and specification of the fish pass which he proposes to erect, a reasonable time before his application; and it shall be lawful for such owner to urge any objections he may think fit to the Home Office against their giving their consent, and the Home Office shall take any objections so made into consideration before they give their consent to the attachment of the fish pass.

25. *Fish Passes to future Dams.*—Every person who, after the passing of this Act, in waters where salmon are found, constructs a new dam, or raises or alters, so as to create increased obstruction to fish, a dam already constructed, shall attach and maintain attached thereto in an efficient state a fish pass of such form and dimensions as may be determined by the Home Office, and if he do not, such person shall incur a penalty not exceeding five pounds; and it shall be lawful for the Home Office to cause to be done any work by this section required to be done by such person, and to recover the expense of doing the same in a summary manner from the person in default; but this section shall not authorize anything to be done which may injuriously affect any navigable river, canal, or inland navigation, nor shall anything in this or the last preceding section prevent any person from removing a fish pass for the purpose of repairing or altering a dam, so that within a reasonable time he restore such fish pass in as an efficient a state as it was before he removed the same.

26. *Supply of Water to Fish Passes.*—Where a fish pass is attached to any dam in pursuance of this Act, the sluices, if any, for drawing off the water which would otherwise flow over the dam shall be kept shut at all times when the water is not required for milling purposes in such manner as to cause such water to flow through the fish pass; and any person making default in complying with the requisitions of this section shall incur a penalty not exceeding five shillings *per* hour for every hour during which such default continues; but this section shall not preclude any person from opening a sluice for the purpose of letting off water in cases of flood, or for milling purposes, or when necessary for

the purposes of navigation, or for cleaning or repairing any dam or mill or the appurtenances thereof.

Restrictions as to Fishing Wears.

27. *Free Gaps.*—Where any fishing wear extends more than halfway across any stream at its lowest state of water, it shall have a free gap or opening in accordance with the regulations following, unless otherwise authorized by the Home Office, under the powers of the Act; that is to say,

(1.) The free gap shall be situate in the deepest part of the stream between the points where it is intercepted by the wear:

(2.) The sides of the gap shall be in a line with and parallel to the direction of the stream at the wear:

(3.) The bottom of the gap shall be level with the natural bed of the stream above and below the gap:

(4.) The width of the gap in its narrowest part shall be not less than one tenth part of the width of the stream: provided always, that such gap shall not be required to be wider than forty feet, and shall not in any case be narrower than three feet.

28. *Free Gaps in Fishing Wears.*—The following rules shall be observed for the purpose of enforcing efficient free gaps in fishing wears; that is to say,

(1.) Where a wear is without a legal free gap at the time of the commencement of this Act the owner of such wear shall within twelve months after the commencement of this Act make such a gap, and if he does not he shall incur a penalty not exceeding five pounds for every day after the expiration of such period of twelve months during which he does not make such free gap.

(2.) Where a free gap has been made in a wear, but the same is not maintained in accordance with this Act, the owner of such wear shall incur a penalty not exceeding one pound a day for each day he is in default:

(3.) No alteration shall be made in the bed of any river in such manner as to reduce the flow of water through a free gap; if it is, the person making the same shall incur a penalty not exceeding five pounds, and a further penalty of one pound a day until he restores the bed of the river to its original state:

(4.) No person shall place any obstruction, use any contrivance, or do any Act whereby fish may be scared, deterred, or in any way prevented from freely entering and passing up and down a free gap at all periods of the year; and any person placing any obstruction, using any contrivance, or doing any act in contravention of the regulation lastly herein before contained shall incur a penalty not exceeding five pounds for the first offence, and not exceeding ten pounds for each subsequent offence; but this last regulation shall not apply to a temporary bridge or board used for crossing the free gap, and taken away immediately when a person has crossed the same.

29. *Boxes and Cribs in Fishing Wears and Fishing Mill-Dams.*—The following Rules shall be observed in relation to the construction of boxes and cribs in fishing wears and fishing mill-dams; that is to say,

(1.) The upper surface of the sill shall be level with the bed of the river:

(2.) The bars or inscales of the heck or upstream side of the box or crib shall not be nearer each other than two inches, and shall be capable of being removed, and shall be placed perpendicularly:

And the owner of any fishing wear, or fishing mill-dam, that has attached thereto any box or crib, in contravention of this Act, shall bring the same into conformity with this Act within six months after the commencement of this Act; and he shall incur a penalty not exceeding 5*l.* for every day after the expiration of such period of six months, during which he fails to comply with the provisions of this section; and any owner failing so to maintain the same, shall incur a penalty not exceeding 1*l.* for every day during which such failure continues.

30. *Spur Walls in Fishing Wears or Fishing Mill Dams.*—There shall not be attached to any box or crib in any fishing wear or fishing mill-dam, any spur or tail wall, leader, or outrigger, of a greater length than twenty feet from the upper or lower side of such box or crib; and if any box or crib in any fishing wear or fishing mill-dam has any walls, leaders, or outriggers, in contravention of this section, the owner of the wear or fishing mill-dam shall incur a penalty not exceedind 1*l.* for every day during the continuance thereof.

CENTRAL AUTHORITY.

31. *Superintendence of Fisheries by Home Office.*—The general superintendence of the salmon fisheries throughout *England* shall be vested

in the Home Office, and it shall be lawful for the Home Office to appoint two inspectors of fisheries for three years, to assign to them their duties, and to pay to them such salaries as may from time to time be determined by the Commissioners of Her Majesty's Treasury.

The Home Office may from time to time remove the said inspectors, and appoint other persons in their stead.

32. *Annual Reports of Fishery Inspectors.*—The Home Office shall annually lay before Parliament reports from the inspectors, which reports shall contain as far as may be practicable a statistical account of the fisheries, with such other information as may be collected, and suggestions offered for their regulation and improvement.

33. *Conservators of Rivers.*—It shall be lawful for the Justices of the Peace assembled at any general or quarter sessions of the peace from time to time to appoint conservators or overseers for the preservation of salmon, and enforcing for that purpose the provisions of this Act within the limits of the jurisdiction of such Justices.

34. *Search Warrant to Enter Suspected Places.*—It shall be lawful for any Justice of the Peace, upon an information on oath that there is probable cause to suspect any breach of the provisions of this Act to have been committed on any premises, or any salmon illegally taken, or any illegal nets or other engines to be concealed on any premises, by warrant under his hand and seal, to authorize and empower any inspector, water bailiff, conservator, constable, or police officer, to enter such premises for the purposes of detecting such offence, or such concealed fish, at such time or times, in the day or night, as in such warrant may be mentioned, and to seize all illegal engines, or any salmon illegally taken, that may be found on such premises; provided that no such warrant shall continue in force for more than one week from the date thereof.

Legal Proceedings.

35. *Procedure and Recovery of Penalties.*—All penalties imposed by this Act, and all costs or expenses by this Act directed to be recovered in a summary manner, may be recovered, within six months after the commission of the offence, before two Justices, in manner directed by an Act passed in the eleventh and twelfth years of the reign of her present Majesty Queen *Victoria*, chapter forty-three, intituled *An Act to facilitate the Performance of the Duties of the Justices of the Peace out of Sessions within* England *and* Wales *with respect to Summary Convictions and Orders*, or of any Act amending the same; and all

monies received in respect of penalties recovered under the Act shall be paid as follows; that is to say,

Such portion not exceeding one half, as the Court may think fit, to the person on whose complaint the penalty is recovered, and the remainder in manner directed by the said Act of eleventh and twelfth years of the reign of her present Majesty *Victoria*, chapter forty-three; and all forfeitures shall be disposed of as the Court may direct, and the proceeds, if any, shall be applied in manner in which the monies received in respect of penalties are hereby directed to be applied.

36. *Offences on Rivers Dividing Counties.*—Where any offence under this Act is committed in or upon any waters forming the boundary between any two counties, districts of quarter sessions or petty sessions, such offence may be prosecuted before any Justice or Justices of the Peace in either of such counties or districts.

37. *Offences on Sea-Coast.*—Any offence committed under this Act, on the sea-coast or at sea, beyond the ordinary jurisdiction of any Justice of the Peace, shall be deemed to have been committed within the body of any county abutting on such sea-coast, or adjoining such sea, and may be tried and punished accordingly.

38. *Saving Clause for Dredging.*—Nothing in this Act contained shall prejudice the legal right of any conservators, directors, commissioners, undertakers, persons, or body of persons, corporate or unincorporate, to dredge, scour, cleanse, or improve any navigable river, canal, or other inland navigation.

REPEAL OF ACTS.

39. *Repeal of Acts.*—From and after the commencement of this Act, there shall be hereby repealed the several Acts and parts of Acts set forth in the schedule hereto, to the extent to which such Acts or parts of Acts are therein expressed to be repealed: provided that such repeal shall not affect—

1. Any security duly given before this Act comes into operation.
2. Anything duly done before this Act comes into operation.
3. Any liability accruing before this Act comes into operation.
4. Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation.
5. The institution of any legal proceeding or other remedy for ascertaining, enforcing, or recovering any such liability, penalty, forfeiture, or punishment as aforesaid.

SCHEDULE.

REFERENCE TO ACT.	TITLE OF ACT.	EXTENT OF REPEAL.
13 Ed. I. stat. 1, c. 47.	A penalty for taking of salmon at certain times of the year.	The whole Act.
25 Ed. III. stat. 4, c. 4.	"New weirs shall be pulled down and not repaired."	The whole Act.
45 Ed. III. c. 2.	The penalty of him that setteth up or enhanceth wares.	The whole Act.
13 Rich. II. stat. 1, c. 19.	A confirmation of stat. 13. Ed. I. stat. 1, c. 47.	The whole Act.
17 Rich. II. c. 9.	Justices of Peace shall be Conservators of the statutes made touching salmon.	The whole Act.
1 Hen. IV. c. 12.	A confirmation of former statutes touching pulling down of wears.	The whole Act.
4 Hen. IV. c. 11.	Commissions shall be awarded to Justices, &c. to inquire of wears and kidels, &c.	The whole Act.
2 Hen. VI. c. 15.	No man shall fasten nets to anything over rivers.	The whole Act.
12 Ed. IV. c. 7.	An Act for the taking away wears and fishgarthes.	The whole Act.
11 Hen. VII. c. 5.	Every man may pull down the wears and engines in the Haven of Southampton, &c.	The whole Act.
14 & 15 Hen. VIII. c. 13.	A confirmation of the statute 11 Hen. VII. c. 5, and the same made perpetual.	The whole Act.
23 Hen. VIII. c. 18.	For pulling down piles and fishgarths in the river Ouse and Humber.	The whole Act.
1 Eliz. c. 17.	An Act for the preservation of spawn and fry of fish.	In so far as it relates to salmon.
3 Car. I. c. 4.	An Act for continuance and repeal of divers statutes.	The first section of the Act.
3 Jas. I. c. 12.	An Act for the better preservation of sea fish.	The whole Act.

REFERENCE TO ACT.	TITLE OF ACT.	EXTENT OF REPEAL.
30 Car. II. c. 9.	An Act for the better preservation of fishing in the river of Severn.	The whole Act.
4 Ann, c. 21.	An Act for the increase and better preservation of salmon and other fish in the rivers within the counties of Southampton and Wiltshire.	The whole Act.
9 Ann. c. 26.	An Act for the better preservation and improvement of fishery within the river of Thames, and for regulating and governing the Company of Fishermen of the river.	The second sectio of the Act.
1 Geo. I. stat. 2, c. 18.	An Act for the better preventing fresh fish taken by foreigners being imported into this kingdom, and for the preservation of the fry of fish, and for the giving leave to import lobsters and turbets in foreign bottoms, and for the better preservation of salmon within several rivers in that part of this kingdom called England.	Sect. 11 to 16, inclusive.
23 Geo. II. c. 26.	An Act to continue several laws, &c. and also to amend so much of an Act made in the first year of the reign of King George the First as relates to the better preservation of salmon in the river Ribble.	Sects. 7, 8, & 9.
33 Geo. II. c. 27.	An Act to repeal so much of an Act passed in the twenty-ninth year of his present Majesty's reign concerning a free market for fish at Westminster as requires fishermen to enter their fishing vessels	Sect. 13.

REFERENCE TO ACT.	TITLE OF ACT.	EXTENT OF REPEAL.
	at the office of the Searcher of the Customs at Gravesend, and to regulate the sale of fish at the first hand in the fish markets in London and Westminster, and to prevent salesmen of fish buying fish to sell again on their own account, and to allow biet and turbot, brill and pear, although under the respective dimensions mentioned in a former Act, to be imported and sold, and to punish any persons who shall take or sell any spawn, brood, or fry of fish, unsizeable fish, or fish out of season, or smelts under the size of five inches, and for other purposes.	
18 Geo. III. c. 33.	An Act for the better preservation of fish, and regulating the fisheries in the rivers Severn and Verniew.	In so far as it relates to salmon.
37 Geo. III. c. 95.	An Act to amend two Acts made in the fourth year of the reign of Queen Anne and the first year of the reign of King George the First, for the preservation of salmon and other fish in the rivers within the counties of Southampton and Wilts.	In so far as it relates to salmon.
58 Geo. III. c. 43.	An Act for preventing the destruction of the breed of salmon and fish of salmon kind in the rivers of England.	The whole Act.
6 & 7 Vict. c. 33.	An Act to repeal so much of an Act of the first year of King George the First as limits the	The whole Act.

REFERENCE TO ACT.	TITLE OF ACT.	EXTENT OF REPEAL.
	time for taking and being restrained from taking salmon in certain rivers, and to amend and extend the provisions of an Act of the fifty-eighth year of King George the Third to the rivers therein mentioned.	
11 & 12 Vict. c. 52.	An Act to explain the Acts for preventing the destruction of the breed of salmon and fish of the salmon kind.	The whole Act.

PRIVATE ACTS RELATING TO SALMON FISHERIES.

REFERENCE TO ACT.	RIVERS AFFECTED.	EXTENT OF REPEAL.
43 Geo. III. c. 61.	Teign, Dart, and Plym, Devon.	The whole Act.
44 Geo. III. c. 45.	Rivers flowing into the Solway Firth.	The whole Act, except in so far as it relates to Scotland, and to fish other than salmon in England.
45 Geo. III. c. 33.	Carmarthenshire rivers.	The whole Act.
46 Geo. III. c. 19.	Rivers running into Milford harbour.	In so far as it relates to salmon.
49 Geo. III. c. 2.	Lord Lonsdale's fisheries in Derwent.	The whole Act.
5 & 6 Vict. c. 63.	Tyne.	The whole Act.
21 & 22 Vict. c. 141.	Tees.	So much of sects. 63 & 64 as relates to the making of bye-laws for the regulation of salmon fisheries.

SALMON EXPORTATION ACT, 26 VICT. C. 10.

WHEREAS the sale of salmon within the United Kingdom is prohibited at various times; that is to say, if caught in *England* within the limits of the Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, is prohibited between the third day of *September* and the second day of *February;* if caught in any fishery district in *Ireland* is prohibited during such time as the capture of salmon is prohibited in that district; if caught in *Scotland* within the limits of "The Salmon Fisheries (*Scotland*) Act, 1862," 25 & 26 Vict. c. 97, is prohibited between the commencement of the latest and the termination of the earliest annual close time fixed for any district; if caught in the river *Tweed*, as defined by "The *Tweed* Fisheries Amendment Act, 1859," 22 & 23 Vict. c. lxx. is prohibited between the fourteenth day of *September* and the fifteenth day of *February:* And whereas the capture or possession of foul or unseasonable salmon within the limits of the United Kingdom is prohibited at all times: And whereas the provisions of the said acts are evaded by the exportation for sale in *France* and other foreign countries of salmon that cannot legally be sold within the limits of the United Kingdom: be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Short Title.*—This Act may be cited for all purposes as "The Salmon Acts Amendment Act, 1863."

2. "*Parts beyond Seas*" *defined.*—No part of the United Kingdom, however situated with regard to any other part, shall be deemed for the purposes of this Act to be parts beyond seas.

3. *Export of unclean or unseasonable Salmon, or Salmon caught at certain Times.*—No unclean or unseasonable salmon, and no salmon caught during the time at which the sale of salmon is prohibited in the district where it is caught, shall be exported or entered for exportation from any part of the United Kingdom to parts beyond seas.

All salmon exported or entered for exportation in contravention of this section shall be forfeited, and the person exporting or entering the same for exportation shall be subject to a penalty not exceeding five pounds in respect of each salmon so exported or entered for exportation.

The burden of proving that any salmon entered for exportation from any part of the United Kingdom to parts beyond seas between the third day of *September* and the second day of *February* following is not

so entered in contravention of this Act shall lie on the person entering the same for exportation.

4. *Recovery of Penalties.*—All penalties under this Act may be recovered in *England*, except within the limits of the said *Tweed* Fisheries Act, as penalties under the Salmon Fishery Act, 1861; in *Ireland* as penalties under the Act passed in the session of the fifth and sixth years of the reign of her present Majesty, chapter one hundred and six, intituled *An Act to regulate the* Irish *Fisheries;* in *Scotland*, except within the limits of the said *Tweed* Fisheries Act, as penalties under the Salmon Fisheries (*Scotland*) Act, 1862; and within the limits of the said *Tweed* Fisheries Act, in manner prescribed by "The *Tweed* Fisheries Act, 1857."

SCOTLAND.

25 & 26 VICT. C. 97.

An Act to regulate and amend the Law respecting the Salmon Fisheries of *Scotland*.

[*7th August*, 1862.]

WHEREAS it is expedient that the Acts relating to the salmon fisheries in *Scotland* should be amended, and that further provision should be made for the regulation of fisheries, the removal of obstructions, and the prevention of illegal fishing: be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Short Title.*—This Act may be cited for all purposes as "The Salmon Fisheries (*Scotland*) Act, 1862."

2. *Interpretation of Terms.*—The following words and expressions in this Act shall have the meanings hereby assigned to them, unless such meanings be repugnant to or inconsistent with the context:

"Commissioners" shall mean the commissioners appointed and acting under the authority of this Act for the time being:

"Clerk" shall mean the clerk to be appointed by any district board:

"Sheriff" shall mean the Sheriff of the county in *Scotland* of which he is Sheriff, and shall include sheriff's substitute:

"Justice" or "Justices" shall mean any Justice or Justices of the Peace acting for the county, city, or burgh where the matter requiring the cognizance of such Justice or Justices shall arise:

"Secretary of State" shall mean one of Her Majesty's Principal Secretaries of State:

"Proprietor" or "Proprietors" shall mean and include any person, company, or corporation who is the proprietor of a salmon fishery, or who receives or is entitled to receive the rents of such fishery on his or their own account, or as trustee, guardian, or factor for any person, company, or corporation, and shall also include Her Majesty in right of Her Crown:

"Bye-law" and "Bye-laws" shall include all rules, orders, and regulations made by the Commissioners under the authority of this Act:

"Salmon" shall mean and include salmon, grilse, sea trout, bull trout, smolts, parr, and other migratory fish of the salmon kind:

"Fisheries" and "Fishery" shall mean salmon fisheries and a salmon fishery in any river or estuary or in the sea:

"River" shall include tributaries and any lake from or through which any river flows:

"Valuation Roll" shall mean the valuation roll in force for the time for any county, and each of the royal burghs therein, made up under the authority of the public general Act Seventeenth and Eighteenth *Victoria*, chapter Ninety-one, or any other Act relating to the valuation of lands and heritages in *Scotland* which may be in force for the time.

3. *Commencement of Act.*—The enactments and provisions of this Act with respect to the appointment, powers, and duties of the Commissioners, and the election, powers, and duties of district boards, shall come into operation and take effect from and after the passing of this Act, and all the other enactments and provisions of this Act shall come into operation and take effect from and after the first day of *January* one thousand eight hundred and sixty-three.

4. *Each River and Estuary, and the Sea-coasts adjoining, to be a District.*—Each river in *Scotland* flowing into the sea, and every tributary stream or lake flowing into or connected with such river, and the mouth or estuary of such river, and the sea-coasts adjoining thereto, divided into such portions as may be fixed and defined by the Commissioners under the authority of this Act, shall form a district for the purposes of this Act.

5. *Commissioners to be appointed by Secretary of State.*—It shall be lawful for the Secretary of State to appoint three Commissioners for the purposes of this Act, who shall be paid at such rate, not exceeding three pounds per day each, as the Commissioners of the Treasury may direct, the whole amount to be received by each Commissioner not

exceeding three hundred and fifty pounds per annum, over and above such travelling expenses as the Commissioners of the Treasury may sanction: provided that the duration of the office of such Commissioners shall in no case extend beyond three years.

6. *Duties of Commissioners*—The Commissioners shall have the powers and perform the duties hereinafter specified; that is to say,

(1.) To fix and define, for the purposes of this Act and the other Acts relating to salmon and salmon fisheries in *Scotland*, the natural limits which divide each river in *Scotland* (including the estuary thereof) from the sea, in so far as the same may not be already fixed by statute or by judicial decision:

(2.) To fix, for the purposes of this Act, the limits of the *Solway Firth*, having regard to an Act passed in the forty-fourth year of the reign of His Majesty King *George* the Third, chapter forty-five:

(3.) To fix, for the purposes of this Act, the limits of every district, and the portions of the sea-coast adjoining to the mouth or estuary of any river to be included in such district:

(4.) To fix, for the purposes of this Act, a point on each river (including the estuary thereof) below which the proprietors of fisheries shall be lower proprietors, and above which the proprietors of fisheries shall be upper proprietors:

(5.) To determine, subject to the provisions of this Act, at what dates the annual close time for every district shall commence and terminate, and at what periods subsequent to the commencement and prior to the termination of the annual close time it shall be lawful to fish for and take salmon with the rod and line: provided that the number of days during which such annual close time shall continue shall be the same as regards every district:

(6.) To make general regulations with respect to the following matters; viz.

The due observance of the weekly close time:

The construction and use of cruives:

The construction and alteration of mill-dams, or lades, or water-wheels, so as to afford a reasonable means for the passage of salmon:

The meshes of nets (so that they shall not intercept smolts or salmon fry):

Obstructions in rivers or estuaries to the passage of salmon:

Provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter, or possessed for time immemorial.

7. *Annual and Weekly Close Time.*—The annual close time for every district shall continue for one hundred and sixty-eight days; and the weekly close time, except for rod and line, shall continue from the hour of six of the clock on *Saturday* night to the hour of six of the clock on *Monday* morning; but the Commissioners shall have power, on the application of the District Board, or of any two proprietors of fisheries in any district, to vary the period at which the weekly close time shall commence in any district, or any part thereof, in so far as they may think reasonable or expedient: provided that such weekly close time shall in no case be less than thirty-six hours.

8. *Application of Annual Close Time.*—The annual close time shall be applicable to every mode of fishing for or taking salmon in any river, lake, or estuary, or in the sea, except by means of the rod and line for the periods in each district to be fixed by the Commissioners subsequent to the commencement and prior to the termination of the annual close time during which it shall be lawful to fish for and take salmon by means of the rod and line.

9. *Present Annual Close Times to subsist until altered.*—In regard to any river and estuary which are regulated by any local Act relating thereto the annual close time fixed by such Act, and in regard to all other rivers, estuaries, and sea-coasts in *Scotland* the annual close time fixed by the public general Act Ninth *George* the Fourth, chapter thirty-nine, shall respectively be applicable until the annual close time with respect to any such river, estuary, or sea-coast shall be otherwise determined by any bye-law made by the Commissioners under the authority of this Act.

10. *Fishing Illegal where prohibited by existing Acts.*—It shall not be lawful to fish for or take salmon at any place or by any mode prohibited by any statute relating to salmon or salmon fisheries in *Scotland* subsisting and in force at the date of the passing of this Act; and nothing contained in this Act or in any bye-law made by the Commissioners shall render legal any mode of fishing which was or would have been illegal at the date of the passing of this Act.

11. *Miscellaneous Offences.*—Every person who commits any of the following offences shall for every such offence be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding two pounds for every salmon taken or killed contrary to the provisions of this Act, or of any bye-law made by the Commissioners under the

authority of this Act; and shall, in addition to such penalties, at the discretion of the magistrate, forfeit every boat, net, rod, line, or other article which has been or may be used in fishing for or taking salmon, and which is found in the possession of such person at the time of the committing such offence; that is to say,

Every person who fishes for or takes salmon during the annual close time by any means other than the rod and line:

Every person who fishes for or takes salmon, except during *Saturday* or *Monday*, by rod and line, during the weekly close time, or acts in breach or contravention of any bye-law made by the Commissioners in regard thereto:

Every person who fishes for or takes salmon during the annual close time by means of the rod and line at a period not sanctioned by the Commissioners:

Every person who fishes for salmon with a net having a mesh contrary to any bye-law of the Commissioners:

Every person who obstructs or impedes the passage of salmon contrary to any bye-law of the Commissioners:

Every person who sells or exposes for sale fresh salmon taken within the limits of this Act during the period between the commencement of the latest and the termination of the earliest annual close time which may have been fixed for any district; but the burden of proving that salmon so sold or exposed by any person for sale have been caught beyond the limits of this Act shall lie on the person selling or exposing the same for sale:

Every person who takes or has in his possession any foul or unseasonable salmon:

Every person who uses or has in his possession any light for the purpose and with the intention of taking salmon:

Every person who sets a net or any other engine for capture of salmon when the fish show themselves when leaping at or trying to ascend any fall or other impediment:

Every person who wilfully takes or destroys or injures or obstructs the passage of the young of salmon, or disturbs any spawning bed, or any bank or shallow on which the spawn of salmon may be deposited; but this provision shall not apply to acts done for the purpose of the artificial propagation of salmon or for other scientific purposes, or in the course of the exercise of rights of property in the bed of any stream: provided also, that the district board may, with the consent of all the proprietors of salmon fisheries in any river or estuary, adopt such means as

they think fit for preventing the ingress of salmon into narrow streams or tributaries in which they or the spawning beds are, from the nature of the channel, liable to be destroyed, but always so that no water rights used or enjoyed for the purposes of manufactures or agricultural purposes or drainage shall be interfered with thereby.

12. *Using Salmon Roe.*—Every person who uses salmon roe for the purpose of fishing, or has in his possession any salmon roe for sale or for the purpose of fishing, shall for every such offence be liable to a penalty not exceeding two pounds, and shall forfeit any salmon roe found in his possession.

13. *Poisoning Rivers.*—Every person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any river containing salmon, any liquid or solid matter poisonous or deleterious to salmon, or who shall discharge into any river sawdust to an extent injurious to any salmon fishery, shall be liable to the following penalties: (that is to say,)

For the first offence a penalty not exceeding five pounds:

For the second offence a penalty not exceeding ten pounds, and a further penalty not exceeding two pounds for every day during which such offence is continued:

For the third or any subsequent offence a penalty not exceeding twenty pounds, and a further penalty not exceeding five pounds for every day during which such offence is continued:

But no person shall be subject to the foregoing penalties for any act done in the exercise of any right to which he is by law entitled, if he prove to the satisfaction of the Court before whom he is tried that he has used the best practicable means, within a reasonable cost, to dispose of or to render harmless the liquid or solid matter so permitted to flow or to be put into waters; but nothing herein contained shall prevent any person from acquiring a legal right in cases where he would have acquired it if this Act had not passed, or exempt any person from any punishment to which he would otherwise be subject, or legalize any act or default that would but for this Act be contrary to law.

14. *Commissioners to Visit and Report on Rivers and Estuaries.*—The Commissioners shall visit and report on the several rivers and estuaries and salmon fisheries in *Scotland*, after notice duly given by special advertisement in some newspaper of general circulation in the district, not less than ten days before any such visitation, to the proprietors of salmon fishings on each of such rivers or estuaries, of their intention so to visit and report.

15. *Commissioners to make Bye-laws on Matters specified.*—The Commissioners shall, on or before the first day of *January* one thousand eight hundred and sixty-three, fix and determine by bye-laws the matters specified in the third and fourth sub-divisions of the sixth section of this Act; and a copy of such bye-laws applicable to each district shall be, prior to the said date, transmitted by post to the sheriff clerk of each county, in so far as the same may relate to a district or part of a district situate therein; and the sheriff clerk shall, on receipt of such copy, give notice of such bye-laws by advertisement inserted once for each of two successive weeks in some newspaper published in such county, or, if no newspaper be published therein, in some newspaper published in a county adjoining thereto; and every person whose interests may be affected by any such bye-laws may state to the Secretary of State any objections to any such bye-law; and the Secretary of State shall, after one month after the date of such bye-laws, approve or alter or disapprove of the same; and every such bye-law, when approved of or altered by the Secretary of State, shall be published in the *Edinburgh Gazette*, and in such further mode as the Secretary of State may direct, and on being so published shall be legal and binding on all concerned: provided that in the case of such districts in which by reason of their inconsiderable size it may seem to the Commissioners unnecessary to determine such matters, they may defer doing so until required by more than six proprietors of fisheries within the same, after the limits of such district have been defined, as hereinafter provided, and shall proceed, in other respects, as above provided.

16. *Bye-laws on other Matters.*—The Commissioners shall, on or before the first day of *January* one thousand eight hundred and sixty-four, determine the other matters specified in the sixth section of this Act, by bye-laws under their hands, or the hand of any two of them, and shall report the same to the Secretary of State; provided that previously to making such bye-laws they shall communicate the same to the district board, and afford the board reasonable opportunity of making any representation to the Commissioners respecting the same; and a copy of such bye-laws shall be transmitted to the sheriff clerk of each county, in so far as the same may relate to any district situated therein; and the sheriff clerk shall, on the receipt of such copy, give notice of such bye-laws by advertisement inserted once for each of two successive weeks in some newspaper published in such county, or, if no newspaper be published therein, in some newspaper published in a county adjoining thereto; and every person whose interests may be affected by any such bye-laws may state to the Secretary of State any ob-

jections to any such bye-law; and the Secretary of State shall, after two months and within four months after the date of such bye laws, approve or alter or disapprove of the same; and every such bye-law, when approved of or altered by the Secretary of State, shall be published in the *Edinburgh Gazette*, and in such further mode as the Secretary of State may direct, and on being so published shall be legal and binding on all concerned.

17. *Evidence taken by Commissioners.*—The Commissioners, in execution of this Act, shall take such evidence as they may find to be necessary, and in the event of witnesses refusing to attend and give evidence, or to allow access to documents, they may apply to the sheriff of the county for a warrant to cite witnesses and havers, and the sheriff is hereby authorized to grant the same.

18. *Election of District Boards.*—Within three months after any bye-law constituting the district shall have been published the sheriff shall direct the sheriff clerk to make up a roll of the upper proprietors and also a roll of the lower proprietors in each district; and the qualification of an upper proprietor shall be the property of a fishery entered in the valuation roll, as of the yearly rent or yearly value of 20*l.* or upwards, or, if such fishery be not valued on the valuation roll, of half a mile of frontage to the river, with a right of salmon fishing, and the qualification of a lower proprietor shall be the property of a fishery entered in the valuation roll as of the yearly rent or yearly value of twenty pounds or upwards; and the sheriff shall have power to decide summarily any question arising on any claim to such qualification; and the sheriff shall thereafter direct the sheriff clerk to call a meeting of the upper proprietors, and also a meeting of the lower proprietors, at such times and places as he shall direct; and notice of such meeting shall be given as hereinbefore provided with respect to the publication of bye-laws made by the Commissioners; and the upper proprietors and the lower proprietors present at such separate meetings respectively shall elect not more than three of their number to be members of the district board, every proprietor of a fishery valued at more than five hundred pounds on the valuation roll having two votes at such election, and an additional vote for every five hundred pounds of rental, but not more than four votes in all; and the members so elected with the proprietor having the largest amount entered in the valuation roll as the yearly rent or yearly value of fisheries in such district shall constitute the district board; and the last-mentioned proprietor shall be the chairman of the board, and have a deliberate as well as a casting vote; and the election of such board shall be notified by the chairman of such respective meetings to the sheriff clerk within

seven days from the date of the same, and the sheriff shall thereafter summon the first meeting of such board for such day and such place as he may fix:[1] provided always, that if any river be situate in two or more counties, the notices above provided shall be given and such meetings shall be called in such manner as the sheriffs of such counties jointly shall direct.

19. *Constitution of the Board where Proprietors are less than Three.*—If in any district the upper proprietors or the lower proprietors shall be fewer in number than three, the board shall consist of an equal number, elected as aforesaid, along with the proprietor having the largest valuation, who shall also be chairman of the board, as above provided; and if such last-mentioned proprietor be the sole upper or the sole lower proprietor, he shall have two votes on the board; and if there shall be only one proprietor in any district such proprietor shall have and may exercise all the powers by this Act conferred on the district board.

20. *Voting by Deputy.*—It shall be lawful for the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or either of them, in cases where Her Majesty in right of her Crown is proprietor of any fishery, and for any corporation or company, being the proprietors of any fishery, or for any proprietor of a fishery, respectively, from time to time to nominate and appoint, by any writing under his or their hand or seal, any person as the mandatory of such Commissioners, corporation, company, or proprietor to attend, act, and vote at any meeting of proprietors under this Act; and every such nomination and appointment shall subsist until recalled by the said Commissioners or either of them, or by the corporation or company or proprietor making the same.

21. *Payment to Sheriff Clerk in connexion with Elections.*—All expenses incurred by the sheriff clerk in making up the roll of proprietors, and in calling and attending the meetings for the election of the district board, with such reasonable remuneration for his time and trouble as shall be fixed by the sheriff, shall be paid to the sheriff clerk by the district board out of the assessments to be levied under the authority of this Act.

22. *Powers and Duties of District Boards.*—The district board may sue or be sued in the name of their clerk, and if there be more than six members three members shall form a quorum, and if there be fewer than six members two shall form a quorum, and they shall keep regular books and accounts, and shall hold their first meeting within ten days after the first election under this Act at a time and place to be fixed at the meetings of proprietors at which such election took place, or in cases

(1) See an amendment to this section, 26 & 27 Vict. c. 50, § 2, *post.*

where such election is not necessary the first meeting shall take place at a time to be fixed by a majority of the proprietors, and notice of such meeting shall be given as hereinbefore provided with respect to the publication of bye-laws to be made by the Commissioners; and the district board shall have power, subject to the provisions of this Act and the bye-laws made by the commissioners, to make and alter from time to time regulations for the preservation of the fisheries in the district, and from time to time to appoint a clerk, and such number of constables, water bailiffs, watchers, and other officers as they think fit, to fix and prescribe the duties of all persons appointed by them, and to remove such persons, and appoint other persons in their stead: and they may combine with any other district board for the purpose of this Act, and to maintain a common staff of officers for the protection and preservation of the fisheries of more than one district, and may agree with the police committee of any county for the purpose of paying additional constables for the better protection of the fisheries in their district: provided that all such regulations shall, before taking effect, be reported to and approved by the Secretary of State, and shall not interfere with any vested right of property, and shall not authorize any encroachment or trespass on private property.

23. *Assessments imposed by District Boards.*—The district board shall have power to impose an assessment for the purposes of this Act, to be called the Fishery Assessment, on the several fisheries in each district, according to the yearly rent or yearly value of such fisheries as entered in the valuation roll; and every proprietor of a fishery which is not valued on the valuation roll, and who shall claim right to vote in the election of members of the district board, shall be held to be a proprietor of a fishery of the value of twenty pounds, and shall be assessed accordingly; and such fishery assessments may be imposed, collected, and recovered by the district board in the same manner as police assessments may be imposed, collected, and recovered by the Commissioners of supply under the authority of the public general Act, twentieth and twenty-first *Victoria*, chapter seventy-two; and for the purpose of imposing, collecting, and recovering such fishery assessments the district boards shall have and may exercise all the powers conferred by the said Act on Commissioners of Supply for imposing, collecting, and recovering the assessments leviable under the same.

14. *Future Elections of District Boards.*—Each district board shall continue in office for three years, and members thereof shall be eligible for re-election, and vacancies occurring during such period shall be filled up by the board until the next meeting of proprietors, who shall then fill up the same; and meetings of the upper and lower proprietors

respectively for the purpose of each triennial election of not more than three upper proprietors and three lower proprietors respectively shall be called by the clerk, who shall give notice of such meetings by advertisement as hereinbefore provided with respect to the publication of bye-laws made by the commissioners; and such meetings shall at the same time take such steps as they shall think proper for auditing and attesting the accounts of the district board for the preceding three years.

25. *Breach of Bye-laws and Regulations.*—It shall be lawful for the district board, by any bye-law or regulation to be made by them and approved of by the Secretary of State as hereinbefore provided, to enact that any person committing any breach or contravention of such bye-law or regulation shall be liable for every such offence to a penalty not exceeding two pounds; and such penalty may be sued for and recovered in the same manner as penalties incurred and imposed under the provisions of this Act.

26. *Forfeited Articles may be Seized.*—Any net, rod, line, or other article directed to be forfeited under this Act may be seized by any constable, water bailiff, watcher, or other officer appointed by the district board, and the Sheriff or Justice may either order the same to be destroyed or to be sold, and the proceeds of such sale to be paid to the clerk on behalf of the district board.

27. *Three or more Persons illegally Fishing at Night.*—If three or more persons acting in concert, or being together or in company, shall at any time between the expiration of the first hour after sunset on any day and the beginning of the last hour before sunrise on the following morning enter or be found upon any ground adjacent or near to any river or estuary or the sea, or in or upon any river or estuary or the sea, with intent illegally to take or kill salmon, or having in his or their possession any net, rod, spear, light, or other instrument used for taking salmon with such intent as aforesaid, or shall illegally take or kill, or attempt to take or kill or aid or assist in killing or taking salmon, every such person shall be guilty in *Scotland* of a criminal offence, and in *England* within the limits of the "*Tweed* Fisheries Amendment Act" of a misdemeanor, and shall for every such offence be liable to a fine not exceeding five pounds, or to imprisonment for any period not exceeding three months, as the Sheriff or Justices before whom such persons or any of them are tried and convicted may determine; and if such fine be not paid immediately on conviction, the offender so failing to pay shall be sentenced to imprisonment for such period, not exceeding three months, as the Sheriff or Justices may adjudge, unless such fine shall be sooner paid.

28. *Procedure and Recovery of Penalties.*—All offences under this

Act may be prosecuted and all penalties incurred under this Act may be recovered before any Sheriff of any two Justices acting together and having jurisdiction in the place where the offence was committed, at the instance of the clerk of any district board or of any other person; and it shall be lawful for the Sheriff or Justices to whom any petition or complaint is presented to proceed in a summary form, and to grant warrant for bringing the persons complained against before him or them, and on proof on oath by one or more credible witness or witnesses or confession of the person accused, or other legal evidence, forthwith to determine and give judgment in such complaint, without any written pleadings or record of evidence, other than a record of the charge and of the judgment pronounced thereon, and to grant warrant for the recovery of all penalties and expenses decerned, by poinding, and imprisonment for any period not exceeding six months; and any person who shall think himself aggrieved by any judgment of the Sheriff or Justices pronounced in any complaint or prosecution under this Act may appeal to the Court of Justiciary at their next circuit court, or where there is no circuit court to the High Court of Justiciary at *Edinburgh*, in the manner and under the rules, limitations, conditions, and restrictions contained in the Act passed in the twentieth year of the reign of His Majesty King *George* the Second, chapter forty-three, for taking away and abolishing heritable jurisdictions in *Scotland*, with this variation, that such person shall, in place of finding caution in the terms prescribed by the said Act, be bound to find caution to pay the penalty and expenses awarded against him by the judgment appealed from, in the event of such appeal being dismissed, together with any additional expenses that shall be awarded by the Circuit Court or Court of Justiciary on dismissing such appeal; and it shall not be competent to appeal from or bring the judgments of any Sheriff or Justices acting under this Act under review by advocation or in any other way than as herein provided.

29. *Enforcement of Regulations and Bye-laws.*—In the event of any person refusing or neglecting to obey any bye-law made by the Commissioners, or any regulation made by the district board, the clerk may apply to the Sheriff by summary petition in ordinary form, praying to have such person ordained to obey the same, and the Sheriff shall take such proceedings and make such orders thereupon as he shall think just.

30. *Expenses of Proceedings.*—In giving judgment on any application or complaint under this Act the Sheriff or Justices may find the person complained against liable in expenses, and may decern for payment of the same.

31. *Recovery of Penalties and Expenses*.—All penalties and expenses incurred under this Act, or under any bye-law or regulation made under the authority thereof, may be recovered by ordinary action or in the Small Debt Court of the Sheriff.

32. *Payment and Application of Penalties*.—The penalties incurred under this Act shall in all prosecutions at the instance of the clerk of any district board be payable to and recoverable by such clerk, and shall in all other cases be paid and applied in such manner as the Sheriff or Justices may direct; and all penalties and expenses received by the clerk, and the proceeds of the sale of any articles seized and directed to be sold as before provided, shall be applied by the district board towards defraying the expenses incurred by them in carrying into execution the provisions of this Act.

33. *Certain Provisions of English Act, Act* 24 & 25 *Vict. c.* 109, *applied to Solway Firth*.—From and after the first day of *January* one thousand eight hundred and sixty-five the provisions of the said Act, intituled *An Act to amend the Laws relating to Fisheries of Salmon in* England, shall extend and apply to salmon fisheries in the waters and on the shores of the *Solway Firth* situate in *Scotland*, as the same may be fixed by authority of this Act, and to the rivers flowing into the same, in so far as such provisions relate to the use of fixed engines for the taking of salmon: provided that all offences against such provisions shall be prosecuted and punished as directed by this Act.

34. *This Act not to apply to Tweed*.—No part of this Act, with the exception of the tenth, twelfth, and twenty-seventh clauses, shall apply to the river *Tweed*, or to any fisheries in the said river or the mouth or entrance thereof, as defined by "The *Tweed* Fisheries Amendment Act, 1859;" and any penalties incurred under the said tenth, twelfth, and twenty-seventh clauses of this Act shall, so far as concerns the river *Tweed*, be recoverable in manner prescribed by the *Tweed* Fisheries Amendment Act, 1857, which Act, and the *Tweed* Fisheries Amendment Act, 1859, shall remain in full force and effect, anything herein contained to the contrary notwithstanding.

26 & 26 VICT. C. 50.

AN Act to amend the Salmon Fisheries (*Scotland*) Act.
[*13th July*, 1863.]

WHEREAS an Act was passed in the twenty-fifth and twenty-sixth years of the reign of Her present Majesty, intituled *An Act to regulate and amend the Law respecting the Salmon Fisheries of* Scotland; and in the sixteenth section thereof it is enacted, that "the Commissioners shall on or before the first day of *January*, one thousand eight hundred and sixty-four," determine certain matters by bye-laws, and report the same to the Secretary of State; and it is expedient that the time so limited should be extended, and that the said Act should be amended: be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Extension of Time for making, &c. Bye-laws.*—The said Commissioners shall determine the said matters specified in the said sixteenth section, by bye-laws under their hands, or the hands of any two of them, and shall report the same to the Secretary of State on or before the first day of *January* one thousand eight hundred and sixty-five.

2. *Notice to be given for calling First Meeting of District Boards.*—The provision in the eighteenth section of the recited Act, that "the sheriff shall thereafter summon the first meeting of such board for such day and such place as he may fix" is hereby repealed; and on the time and place of the first meeting of the district board being fixed as provided by the twenty-second section of the recited Act, and intimated to the sheriff clerk, he shall give notice of such meeting as therein provided; and such first meeting may be held at any time within twenty-one days after the first election of the district board under the recited Act, anything therein contained to the contrary notwithstanding.

3. *As to reading of Sect.* 33 *of* 25 *&* 26 *Vict. c.* 97.—The thirty-third section of the recited Act shall be read and construed as if the words "public general Act, twenty-fourth and twenty-fifth Victoria, chapter one hundred and nine," had been inserted therein instead of the words "said Act."

4. *Power to Commissioners to extend the Mouth of the Tweed.*—It shall be lawful for the said Commissioners, on or before the first day of *January* one thousand eight hundred and sixty-four, by a bye-law under their hands, or the hands of any two of them, to be made, published, and approved in the manner provided in the fifteenth section of the recited Act, to extend the limits of the mouth or entrance of the river *Tweed* northwards from the limits thereof as defined in "The *Tweed* Fisheries Amendment Act, 1859," along the sea coast and into the sea to such points and to such extent as they may fix; and from and after the publication of such bye-law in the *Edinburgh Gazette*, and in such further mode as the Secretary of State may direct, the enactments and provisions of "The *Tweed* Fisheries Act, 1857," (with the exception of the fifty-fifth and sixtieth sections), and of "The *Tweed* Fisheries Amendment Act, 1859," and the tenth, twelfth, and twenty-seventh sections of the recited Act shall be applicable to and may be enforced within such extended limits in the same manner and to the same effect as if such extended limits had been included in the mouth or entrance of the river *Tweed* as defined in "The *Tweed* Fisheries Amendment Act, 1859:" provided, that the rates or assessments to be levied on and in respect of the Fisheries beyond the limits of the mouth of the river *Tweed*, as defined in "The *Tweed* Fisheries Amendment Act, 1859," and within the limits as extended under any such bye-law as aforesaid, shall not be applied in or towards the payment or discharge of any debts or obligations contracted by the Commissioners acting under "The *Tweed* Fisheries Act, 1857," previous to the passing of this Act.

IRELAND.

26 & 27 VICT. C. 114.

AN Act to amend the Laws relating to Fisheries in *Ireland.*
[28*th July*, 1863.]

WHEREAS it is expedient to make further provisions for carrying into effect the law relating to the salmon fisheries in *Ireland:* Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

PRELIMINARY.

1. *Short Title.*—This Act may be cited for all purposes as "The Salmon Fishery (*Ireland*) Act, 1863."

2. *Application of Act.*—This Act shall not apply to *England* or *Scotland.*

REGULATIONS AS TO FIXED ENGINES.

3. *Prohibition of Bag-nets in certain Places.*—After the passing of this Act no bag-net shall be placed or allowed to continue in any river or the estuary of any river, as such river or estuary has been defined by the Commissioners of Fisheries or shall be defined by the Commissioners under this Act, or within a distance of less than three statute miles from the mouth of any river as defined as aforesaid.

Any bag-net placed or continued in contravention of this section shall be deemed to be a common nuisance, and may be taken possession of or destroyed; and any bag-net so placed or continued, and any salmon

taken by such bag-net, shall be forfeited, and, in addition thereto, the owner of a bag-net placed or continued in contravention of this section shall, for each day of so placing or allowing the same to be continued, incur a penalty of not less than five pounds and not exceeding twenty pounds.

But no person shall incur any penalty under this section in respect of any bag-net if he removes the same within fourteen days after the passing of this Act: provided always, that no bag-net now legally existing shall be liable to be abated or removed, or be deemed illegal under this Act, by reason of its being within three miles of the mouth of a river in the whole of which, including all tributary rivers and lakes upon its course, the proprietor of such bag-net has the exclusive right of catching salmon.

4. *Penalty on New Fixed Nets.*—No fixed net that was not legally erected for catching salmon or trout during the open season of one thousand eight hundred and sixty-two shall be placed or used for catching salmon or trout in any inland or tidal waters.

Any net placed or used in contravention of this section shall be deemed to be a common nuisance, and may be taken possession of or destroyed; and any net so placed or used, and any salmon taken by such net, shall be forfeited; and in addition thereto, the owner of a net placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty of not less than five pounds, and not exceeding twenty pounds.

5. *Commissioners to Inquire as to Fixed Nets.*—Subject to such appeal as is herein-after mentioned, the Special Commissioners appointed under this Act, hereinafter referred to as the Commissioners, shall abate and remove all fixed nets erected or used for catching salmon or trout in *Ireland* that are in their judgment injurious to navigation, and shall inquire into the legality of, and if satisfied of their illegality remove, all such other fixed nets erected or used as aforesaid as are in contravention of any Act of Parliament or law in force in *Ireland.*

6. *Certificate as to certain Fixed Nets.*—Where any fixed net, other than a bag-net prohibited by this Act, is in use at the time of the passing of this Act, and any person claims to have erected the same in pursuance of the Act of the session of the fifth and sixth years of the reign of Her present Majesty, chapter one hundred and six, the Commissioners may, on proof being given to their satisfaction that such fixed-net has been erected in pursuance of the said provisions, certify to that effect, stating in the certificate the situation, size, and description of the net, and the person who has the right to erect the same, in pursuance of such last-mentioned provisions. A certificate given in

pursuance of this notice shall be deemed to be an order of the Commissioners, and to be subject to appeal as such. If unappealed from, or as confirmed or amended on appeal, such certificate shall be conclusive evidence that the person therein named is the person specified in the said Act as entitled to exercise the right therein given, but it shall not render any net legal that would be otherwise illegal by reason of its being injurious to navigation, a common nuisance to the public right of fishing, or otherwise in violation of common law or any Act of Parliament.

7. *Commissioners to inquire as to Fishing Wears.*—Subject to such appeal as is hereinafter mentioned, the Commissioners shall inquire into the legality of all fishing wears throughout *Ireland*, and shall remove such as are in contravention of any Act of Parliament or law in force in *Ireland*, with this qualification, that where a fishing wear is illegal only by reason of its not having a free gap, as required by law, this section shall not empower the Commissioners to remove such fishing wear, if an undertaking be entered into to the satisfaction of the Commissioners, by the owner or other person interested in such wear, to make a legal free gap therein within a time to be prescribed by the Commissioners, and a free gap is made accordingly.

8. *Persons unlawfully keeping up a Fishing Wear.*—If any person has unlawfully erected or kept up, or shall unlawfully erect or keep up, any fishing wear upon any river, and a notice shall be served in writing upon the proprietor or occupier of such wear, or his known agent, by the owner or occupier of any grounds on the banks of such river on which such wear has been or shall be erected, requiring him to prostrate or open the same within the space of thirty days from the service of such notice, if such proprietor or occupier of such wear shall not within that time abate or prostrate the same, he shall forfeit a sum of fifty pounds, together with costs of suit, to be recovered by action of debt in any of Her Majesty's Courts of Record, one moiety thereof to be to the use of the person who shall sue for the same, and the other to the use of the conservators of the district in which such wear has been or shall be unlawfully erected or kept up; and the said Court shall adjudge such wear to be abated at the expense of the defendant in such action: provided always, that nothing in this section contained shall restrict the powers by this Act given to the Commissioners.

9. *Construction of Free Gaps.*—In every fishing wear there shall be a free gap or opening in accordance with the regulations following, under the powers of this Act; (that is to say,)

(1.) The free gap shall be situate in the deepest part of the stream:

(2.) The sides of the gap shall be in a line with and parallel to the direction of the stream at the wear:

(3.) The bottom of the gap shall be level with the natural bed of the stream above and below the gap:

(4.) The width of the gap in its narrowest part shall be not less than one tenth part of the width of the stream: provided always that such gap shall not be required to be wider than fifty feet, and shall not in any case be narrower than three feet; and provided also, that no existing gap in any wear shall be reduced in width, or a gap of less width substituted in lieu thereof, or any alteration made therein so as to reduce the flow of water through such gap:

Provided always that no person shall be entitled to any compensation by reason of the enforcing of any free gap in any wear, anything to the contrary in any Act notwithstanding.

10. *Construction of Boxes and Cribs in Fishing Wears and Fishing Mill-dams.*—The following rules shall be observed in relation to the construction of boxes and cribs in fishing wears and fishing mill-dams; (that is to say,)

(1.) The upper surface of the sill shall be level with the bed of the river:

(2.) The bars or inscales of the heck or upstream side of the box or crib shall not be nearer each other than two inches, and shall be capable of being removed, and shall be placed perpendicularly; the boxes, cribs, or eruives shall not be built over, or in any other manner hidden from public inspection.

And the owner of any fishing wear or fishing mill-dam that has attached thereto any box or crib in contravention of this Act shall bring the same into conformity with this Act within six months after the commencement of this Act; and he shall incur a penalty not less than five pounds and not exceeding twenty pounds for every day after the expiration of such period of six months during which he fails to comply with the provisions of this section; and any owner failing so to maintain the same shall incur a penalty not less than one pound and not exceeding five pounds for every day during which such failure continues.

11. *Weekly Close Time in lieu of Free Gap.*—In any case where the breadth of the river where any chartered or patent fishing wear now exists shall not exceed forty feet, and it might be inexpedient to require a free gap to be made therein, the Commissioners may, if they think fit, instead thereof, direct by their order the extension of the weekly close time for a period of twenty-four hours.

12. *Enforcing Free Gaps in Fishing Wears.*—The following rules shall be observed for the purpose of enforcing efficient free gaps in fishing wears; (that is to say,)

(1.) Where a wear is without a legal free gap at the time of the commencement of this Act, the owner of such wear shall within twelve months after the commencement of this Act make such a gap, and if he does not he shall incur a penalty not less than five pounds and not exceeding fifty pounds for every day after the expiration of such period of twelve months during which he does not make such gap:

(2.) Where a free gap has been made in a wear, but the same is not maintained in accordance with this Act, the owner of such wear shall incur a penalty not exceeding five pounds a day for each day he is in default.

(3.) No alteration shall be made in the bed of any river in such manner as to reduce the flow of water through a free gap: if it is, the person making the same shall incur a penalty not less than five pounds and not exceeding fifty pounds, and a further penalty of one pound a day until he restores the bed of the river to its original state.

(4.) No person shall place any obstruction, use any contrivance, or do any Act whereby fish may be scared, deterred, or in any way prevented from freely entering and passing up and down a free gap at all periods of the year, or shall use any nets or other engines within fifty yards above or below any free gap; and any person placing any obstruction, using any contrivance, net, or engine, or doing any act in contravention of the regulation lastly hereinbefore contained, shall incur a penalty not less than five pounds and not exceeding twenty pounds for the first offence, and not less than ten pounds and not exceeding fifty pounds for each subsequent offence.

13. *Abatement of Illegal Nets and Wears.*—Before removing any illegal fixed net or illegal fishing wear, the Commissioners shall take the same proceedings as to summoning the parties interested in such net or wear, and as to hearing such parties, and any evidence they may produce, as the Commissioners under the Salmon Fisheries Acts are thereby required to take where any parties complain of the erecting, maintaining, or using any fixed engine; and a summons issued by the Commissioners shall, in respect of the proceedings to be taken by the Commissioners, be deemed to be equivalent to a complaint made under the said section.

14. *Appeal from Decision of Special Commissioners.*—If any person feels aggrieved with any decision of the Commissioners (and for the purposes of an appeal a dismissal of a complaint shall be deemed to be a decision), the person aggrieved may appeal as follows, and not in manner provided by the Salmon Fisheries Acts; that is to say,

1. The appeal shall be to the Court of Queen's Bench in *Ireland.*
2. The appeal shall be by special case stating the facts and the grounds for the decision.
3. The special case shall be settled by the Commissioners upon the application of the appellant to be made in writing within seven days after the delivery of the decision, and not afterwards.
4. The application for a case shall not be entertained by the Commissioners unless the appellant at the time of making the same enter into a recognizance before the said Commissioners or a Justice of the Peace, with or without sureties, and in such sum as the Commissioners or the Justice think fit, conditioned to prosecute without delay the appeal, and to submit to the judgment of the Court of Queen's Bench, and to pay such costs as may be awarded.
5. The special case shall be signed by the Commissioners, and shall be delivered to the appellant by the Commissioners on payment by him of such fees as are hereinafter mentioned.
6. On the receipt of the special case the appellant shall within three days serve a copy on the other party to the proceedings, and transmit by post or otherwise the original case to the proper officer of the Court of Queen's Bench in *Ireland.*
7. The fees to be charged in respect of the preparation of the special case shall be the same fees as are chargeable for the preparation of a special case by the Act passed in the session of the twentieth and twenty-first years of the reign of her present majesty, chapter forty-three, intituled *An Act to improve the Administration of the Law, so far as respects Summary Proceedings before Justices of the Peace,* and hereinafter referred to as "The Summary Jurisdiction Act."
8. The Commissioners may refuse to state a case when they are of opinion that the application is frivolous, but if they so refuse they shall, on the request of the appellant, give him a certificate stating the ground of their refusal.
9. When a party gives in good faith notice of an appeal under this section, but omits through mistake to do some act necessary

to perfect the appeal, the Appellate Court may permit an amendment on such terms as it thinks just.

10. After the decision of the Court of Queen's Bench has been given on a case stated as aforesaid, the Commissioners shall have the same powers to enforce that decision, when affirmed or amended, as they would have had to have enforced their original decision if it had not been appealed from.

11. Save as hereinbefore varied, the provisions of the Summary Jurisdiction Act as to the powers of the Superior Court, as to directing a special case to be stated, as to the enforcing of recognizances, and as to all other matters, shall apply to an appeal under this section, in the same manner as if the words "Justice or Justices" in the said Summary Jurisdiction Act included "the special Commissioners appointed under this Act."

12. Any Act required by this section to be done by the Commissioners may be done by two of them, of whom the barrister hereinafter mentioned shall be one.

13. The decision of the Court of Queen's Bench, in respect of any case brought before them under this section shall, unless the Court otherwise directs, be final.

15. *Transfer of Powers to New Commissioners.*—All powers, rights, privileges, and jurisdictions vested in or exercised by the Commissioners of Public Works, and the Inspecting Commissioners of Fisheries, or any of them, by any Act relating to salmon fisheries, with the exception of the powers relating to oysters and white sea fish, shall be transferred to and vest in the Commissioners appointed under this Act during their continuance in office, and may be exercised by them.

MISCELLANEOUS.

16. *Fishing with Nets near Mill-dam.*—Notwithstanding anything contained in the said Salmon Fisheries Acts, it shall not be lawful for any person or persons, although lawfully possessed of a several fishery for twenty years next before the passing of the Act of the session of the thirteenth and fourteenth years of the reign of Her present Majesty, chapter eighty-eight, to use any box, cribb, cruive, net, instrument, or device for taking fish (save and except rods and lines only), at or within fifty yards, either above or below a mill-dam, unless there is attached to such mill-dam a fish-pass of such form and dimensions as may be approved of by the Commissioners, nor unless such fish-pass has con-

stantly running through it such a flow of water as will enable salmon to pass up and down it; any person offending against this clause shall for each offence incur a penalty of not less than five pounds, and not exceeding twenty pounds, recoverable by any one who will sue for the same.

17. *Power to define Estuaries and Mouths of Rivers.*—Notwithstanding anything contained in the Salmon Fisheries Acts, or any definition of the Commissioners acting in pursuance of those Acts, the Commissioners under this Act shall mark out, by reference to maps or otherwise, what are to be the boundaries of mouths of rivers and estuaries, and the boundaries between the tidal and freshwater portions of every river, for the purposes of this Act and the said Salmon Fisheries Acts, with power where several streams flow into a common mouth or estuary to declare that the outlets of such streams form separate mouths or estuaries. The Commissioners may also define the point or points of mouths of rivers or estuaries from which distances are to be measured under this Act and the Salmon Fisheries Acts.

18.—*Forfeiture of Boat in Illegal Fishing.*—If it be proved to the satisfaction of the Justices that any boat, cot, or curragh, found on or near waters frequented by salmon or trout, has been used for the capture of salmon or trout during any part of the annual or weekly close time, the person or persons who shall be proved to have used such boat, cot, or curragh for the capture of salmon or trout during the annual or weekly close time, shall for the first offence be subject to a penalty not exceeding five pounds, and for the second or any subsequent offence, in addition to the foregoing penalty, the boat, cot, or curragh so used may be seized and forfeited; but this section, so far as relates to the forfeiture of the boat, cot, or curragh, shall not come into operation where a boat is used by some person other than the owner thereof, and the owner proves to the satisfaction of the Justices that it was so used without his knowledge or consent.

19. *Meaning of Terms.*—It is hereby declared, that for the purposes of the said Salmon Fisheries Acts, and of this Act, "jenkin" and "gravelling" are deemed to be "salmon," and "spring tides" mean "ordinary spring tides." (See also sect. 44.)

20. *Weekly Close Season.*—There shall be repealed so much of the said Salmon Fisheries Acts as provides that it shall not be lawful to take or kill any salmon or trout between six of the clock on *Saturday* evening and six of the clock on *Monday* morning, or between the low waters next in point of time to those periods respectively, and the said Acts shall be construed as if it had been enacted therein that no salmon

or trout shall be fished for or taken in any way, except by single rod and line, between six of the clock on *Saturday* morning and six of the clock on the succeeding *Monday* morning; and all penalties imposed by the said Salmon Fisheries Acts, and the provisions made for enforcing the prohibition contained in the said Acts and providing for the free passage of salmon and trout during the times therein in that behalf mentioned, shall apply accordingly, with this addition, that any net or other instrument, or the inscales or gates and rails of any crib, box, or cruive, used between the times aforesaid shall be forfeited, and also that when any salmon or trout is taken at any fishing wear during the weekly close season in contravention of this Act, and the said salmon fisheries Acts, or when any box, crib, or cruive is during the weekly close season left unopened or otherwise left not in comformity with the said Acts, the penalty in that behalf imposed by the said Acts shall be payable in respect of each box, crib, or cruive in the wear in which any fish is so illegally taken, or which is left as aforesaid unopened, or not in conformity with the said Acts.

21. *Alteration of Annual Close Time.*—There shall be repealed so much of the thirty-third section of the Act of the session of the fifth and sixth years of the reign of Her present Majesty, chapter one hundred and six, as provides that the annual close season, or period during which it shall not be lawful to take salmon, shall not comprise fewer than one hundred and twenty-four days in each year; and in lieu thereof be it enacted, that such annual close season or period during which it shall not be lawful to take salmon, shall not comprise fewer than one hundred and sixty-eight days in each year; and until an alteration is made by the Commissioners in pursuance of the powers given to them by the Salmon Fisheries Acts and this Act, there shall be added at the end of the close time now established for each fishery, such number of days, if any, as may be required to make the number of close days constituting the annual close time in that fishery amount to one hundred and sixty-eight days.

22. *Salmon or Trout Caught for Certain Purposes.*—Nothing in this Act contained shall apply to any person who shall catch or attempt to catch, or shall have in his possession, any salmon or trout for the purposes of artificial propagation or other scientific purposes; and nothing in this Act contained shall prejudice the legal right of any owner to take materials from any stream.

23. *Season for Angling with Single Rod and Line.*—Nothing in this Act shall be construed to affect angling with single rod and line, the close season for which shall be from the first day of *November* in each year to the first day of *February* in the year following.

24. *Use of Salmon Nets during certain Hours in Rivers.*—From and after the passing of this Act, it shall not be lawful for any person to use any net, except a landing-net, for the capture of salmon or trout in the freshwater portion of any river, as defined by the Commissioners under this Act, between the hours of eight o'clock in the evening and six o'clock in the morning, except so far as the same may have heretofore been used within the limits of a several fishery next above the tidal flow, and held under grant or charter, or by immemorial usage; and every person offending against the provisions of this section shall be subject to a penalty not exceeding ten pounds, and to the forfeiture of all boats, nets, and gear used in such illegal fishing.

25. *Obstructing Free Passage of Salmon or Trout during Weekly Close Season.*—No person shall in any manner whatever scare, impede, or obstruct the free passage of salmon or trout during the weekly close season: and any person acting in contravention of this section, shall forfeit any fish taken by him, and any net or instrument used by him, and in addition thereto shall incur a penalty not less than two pounds, and not exceeding ten pounds; but this section shall not apply to any person who takes fish legally by the single rod and line during the weekly close season.

26. *Additional Licence Duties on Fixed Engines.*—The Salmon Fisheries Acts shall be construed as if in the schedule annexed to the Act of the eleventh and twelfth years of the reign of Her present Majesty, chapter ninety-two, so far as relates to fixed engines, there had been inserted instead of the duties therein mentioned the duties following; (that is to say),

Bag-nets	£10
Stake-nets, fly-nets, or stake-wears (*Scotch*) . .	30
Head-wears	6
For every box, crib, cruive, or drum-net in any wear for taking salmon or trout	10

and the boards of conservators shall not have authority to reduce or diminish the same, anything in the said Act or any other Act to the contrary notwithstanding.

27. *Magistrates Paying Duty to be Ex officio Members of Board.*—Magistrates paying licence duty, and being owners of land abutting on rivers or lakes in any district, may act and vote as ex officio members of any board of conservators elected for any such district.

28. *New Elections of Conservators.*—On the first Monday in the month of *October* in the year one thousand eight hundred and sixty-four all existing boards of conservators shall cease, and new boards shall be elected.

29. *Residence or Qualification of Conservators.*—No person shall be eligible for the office of conservator in any electoral division in which he does not reside or possess real property.

30. *Use of Hydraulic Machines.*—Where a turbine or similar hydraulic machine, which may be injurious to salmon or the young of salmon in their descent to the sea, is supplied from a river frequented by salmon, the person owning or using such machine shall, during the time in which such descent to the sea takes place, provide grating or other efficient means to prevent such salmon or young of salmon from passing into such machine, and in case such means be not provided such person shall forfeit a sum not exceeding fifty pounds, and also a sum not exceeding five pounds for each day during which such injury to the fry continues.

31. *Salmon-passes and Fish Ladders to be open to Inspection.*—All salmon-passes and fish ladders shall be at all times open to the inspection of the Commissioners and conservators of the district, and of any person duly authorized by them or any of them.

Appointment and Powers of Commissioners.

32. *Appointment of Commissioners.*—Her Majesty may by warrant under the royal sign manual appoint any number of persons not exceeding three, of whom one shall be an officer in the naval service of Her Majesty, and another a barrister of not less than seven years standing at the bar, to be Commissioners under this Act during Her Majesty's pleasure, and upon every vacancy in the office of any commissioner by death, resignation, or incapacity to act may appoint some other fit person to fill the vacancy: provided always, that in the case of a vacancy by the death, resignation, or incapacity of any Commissioner being such officer or barrister, the person so to be appointed shall be of the same profession as the officer or barrister in whose place he shall be appointed.

33. *Commissioners to have a Common Seal.*—The Commissioners appointed under this Act shall be styled "The Special Commissioners for Irish Fisheries;" they shall cause to be made for their commission such seal or seals as they may require; and any summons, order, warrant, or other instrument, or copy thereof, purporting to be sealed with the seal of the Commissioners, and to be signed as hereinafter mentioned, shall be received in evidence without any further proof.

34. *Commissioners not to sit in Parliament.*—No Commissioner shall during his continuance in office be capable of being elected or of sitting as a member of the House of Commons.

35. *Acts of the Commissioners.*—All warrants for the removal of any illegal net or illegal wear shall be signed by two at least of the Commissioners, and all cases relating to the removal of such nets or wears shall be heard by all the Commissioners, but the opinions of two of them shall, in case of difference, decide any question; any other Acts authorized to be done by the Commissioners may be done by any one of them, and any summons under the seal of the Commissioners, and signed by any person delegated by them, shall be deemed to be sufficiently executed.

36. *Salaries of Officers.*—The Commissioners of Her Majesty's Treasury may from time to time fix such salaries as they may think fit for the Commissioners hereby appointed, and also appoint such additional officers, clerks, and servants, at such salaries as the said Commissioners of the Treasury may think proper and necessary, and from time to time dismiss such officers, clerks, and servants, and appoint others in their place.

37. *Duration of Office of Commissioners.*—The offices of the said Commissioners, and all powers, rights, and privileges pertaining thereto, shall continue in force for two years only, and from thenceforth until the end of the next session of Parliament.

38. *Powers of Commissioners.*—The Commissioners may examine any witnesses on oath; and with respect to the following matters, that is to say,

(1.) Enforcing the attendance of witnesses, and the production of deeds, books, papers, and documents;

(2.) The enforcing any order whatever made by them under any of the powers or authorities of this Act or the Salmon Fisheries Acts,

shall in addition to any other powers conferred on them by this Act, have all such powers, rights, and privileges as the Judges of Her Majesty's Court of Queen's Bench in *Ireland* have for such or the like purposes.

39. *Penalty for False Swearing.*—Every person who upon examination before the Commissioners, or any one of them, wilfully gives false evidence, and every person who wilfully swears, affirms, or declares falsely in any affidavit relating to any matter within the cognizance of the Commissioners, shall be liable to the pains and penalties of perjury.

40. *Proceedings before Commissioners not to be Restrained by Injunction, &c.*—The Commissioners shall not be subject to be restrained in the execution of their powers under this Act, nor shall any person be restrained from making an application under this Act to the Commissioners, by order of any Court of Justice or by any other legal

process, nor shall the Commissioners be required by writ of mandamus or any writ of a like nature to do any act or take any proceeding under this Act, nor shall proceedings before them be removable by certiorari or other writ of a like nature.

41. *Proceedings not to abate by Death, &c.*—Proceedings before the Commissioners shall not abate or be suspended by any death or transmission or change of interest; but in any such case of death or transmission or change of interest it shall be lawful for the Commissioners, when they see fit, to require notices to be given to persons becoming interested, or to make any orders for continuing, suspending, or carrying on the proceedings, or otherwise in relation thereto, which to the Commissioners appears just.

42. *Determination of Office of Special Commissioners.*—On the determination of the office of the Special Commissioners, all powers and duties transferred to, vested in, or imposed on them by this Act, shall be transferred to and vested in two permanent Inspectors of Fisheries, to be appointed by and to be subject to the control of the Lord Lieutenant of *Ireland*.

PENALTIES, SAVING CLAUSE, ETC.

43. *Courts may award Cos's.*—It shall be lawful for the Court before which any indictment or information for any offence against this Act, or for any nuisance in tidal or inland waters, shall have been preferred, heard, or tried and determined, to order that the costs, charges, and expenses of and incident to such indictment or information, and the proceedings therein, and the preferring, hearing, or trial and determination thereof, shall follow the event of the same respectively, and be borne and paid by the party against whom the same shall have been determined, and that such costs, charges, and expenses shall be estimated, either as between party and party, or as between attorney and client, at the discretion of such Court.

44. *Construction of Act.*—This Act, so far as is consistent with the tenor thereof, shall be construed with the Acts relating to salmon fisheries in Ireland, and herein referred to as "the Salmom Fisheries Acts," and the definitions of words and expressions now in force in the said Salmon Fisheries Acts shall apply to the same words and expressions when used in this Act, but so as to include "a head wear" under the expression "fixed net," and that "fishing mill-dam" shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes.

45. *Recovery of Penalties.*—All penalties imposed by this Act shall be recovered and applied in manner in which penalties under the said Salmon Fisheries Acts are recoverable and applicable.

46. *Saving Clause.*—Nothing in this Act contained shall render legal or be deemed to recognise as legal, or to confer any title on any person in respect of any fixed net or fishing wear that is in contravention of any Act of Parliament or of the common law in force in *Ireland.*

47. *As to Fixed Engines now in use.*—Provided always, that nothing hereinbefore contained shall prevent any person having any fixed engine now in use, and in respect of which licence has been paid, from being allowed to continue to use the same during the remainder of the present season.

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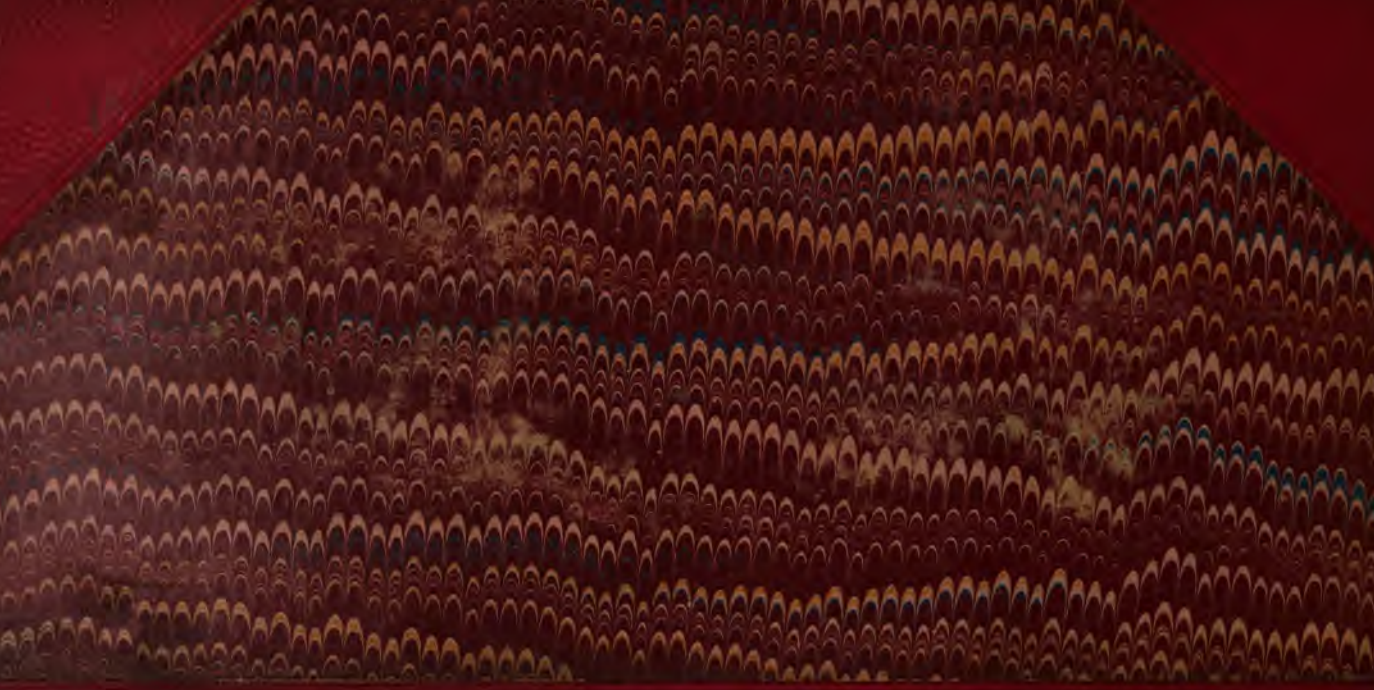
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